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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF IOWA.

BY EASTIN MORRIS,

COUNSELLOR AT LAW.

WITH NOTES AND REFERENCES TO SUBSEQUENT DECISIONS AND LEGISLATION,

BY HON. WILLIAM E. MILLER,

OF THE IOWA CITY BAR, AUTHOR OF MILLER'S PLEADING AND PRACTICE.

VOLUME I.

DAVENPORT, IOWA:

GRIGGS, WATSON & DAY.

1870.

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PREFACE.

This volume contains all the cases argued and determined in the Supreme Court of the territory of Iowa from the organization of the Court down to January term, 1846, in which opinions have been filed.

When the reporter contracted with the publisher it was presumed that this volume would contain full reports of all the cases down to the reorganization of the Court under the state authorities; but in this he has been disappointed. Of the cases decided in 1846, nearly the whole are unavoidably excluded. The reporter has, however, given three important cases in full, and briefs of the remaining ones, with the exception of a few, in which the opinions were incomplete, or could not be found; and which, with other cases of 1846, will be reported for the next volume.

The reporter owes an apology to the public, and especially the members of the Iowa bar, for the delay in bringing out these reports; but in all candor he can say he could not avoid it.

He tenders his respectful thanks to Chief Justice Mason for reports, corrections, and memorandums of all the cases decided prior to January term, 1843.

Iowa City, 1847.

75959

PREFACE TO THE SECOND EDITION.

When the original volume of these reports was published, in 1847, the legal profession of the then territory of Iowa was very limited in number, consequently a very small edition was published. At the present time our young state contains a population exceeding one million, and is rapidly increasing. The members of the legal profession in Iowa at the present time, almost equal her voting population of 1847.

The original volume has long been out of print, and but a small proportion of the profession are supplied with copies of it. A re-print, therefore, seemed to be a necessity.

The publishers having purchased the unexpired copy right, determined upon a re-print, with notes and references to subsequent decisions and legislation. In order that the re-print should correspond with subsequent volumes of the Iowa Reports, larger type and superior paper to that used in the original, has been used, which, together with the notes and references, have materally swelled the size of the volume. The original paging, however, has been preserved in the margin, and the index refers to the marginal pages.

The work of preparing the notes and references has been performed by the editor in the intervals of judicial labor; whether it has been well done, he submits to the judgment of the profession.

SUPREME COURT OF IOWA.

The Supreme Court of Iowa territory was constituted by the act of Congress of June 12, 1838, entitled "An act to divide the territory of Wisconsin, and to establish the territorial government of Iowa." By this organic law, it was provided that the judicial power of the territory of Iowa should be vested in a Supreme Court, District Courts, &c. That the Supreme Court should consist of a chief justice and two associates judges, any two of whom should be a quorum, and who should hold a term at the seat of government of the said territory, annually. And that they should hold their offices for the term of four years. The act also provided that the territory should be divided into three judicial districts, and that a District Court or Courts should be held in each of the three districts by one of the judges of the Supreme Court, at such times and places as might be prescribed by law; and that the judges should, after their appointment, respectively reside in the districts assigned them. That the jurisdiction of the several Courts provided for, both appellate and original, and that of the probate Courts and of the justices of the peace should be as limited by law, &c. The Supreme and District Courts, respectively, were vested with a chancery as well as a common law jurisdiction; and writs of error, bills of exception, and appeals in chancery causes were to be allowed in all cases, from the final decisions of the District Courts to the Supreme Court, under such regulations as might be prescribed by law. But that in no case removed to the Supreme Court, should trial by jury be allowed in said Court.

It was further provided that writs of error and appeals from the final decision of the said Supreme Court should be allowed and taken to the Supreme Court of the United States, in the same manner and under the same regulations as from the Circuit Courts of the United States, where the value of the property or the amount in controversy to be ascertained by the oath or affirmation of either party, should exceed one thousand dollars. And that each of the said District Courts should have and exercise the same jurisdiction in all cases arising under the constitution and laws of the United States, as is vested in the Circuit and District Courts of the United States. And that writs of error and appeals from the final decision of the said Courts, in all such cases, should be made to the Supreme Court of the territory, in the same manner as in other cases.

Under this act, the president, by and with the advice and consent of the Senate, nominated and appointed Charles Mason, chief justice, and Joseph Williams and Thomas S. Wilson, associate judges; who were continued in office, by re-appointment, until the organization of the state government; and presided during the period embraced in these reports.

By the constitution of the state of Iowa, the judicial power is vested in a Supreme Court, District Courts, and such inferior Courts as the General Assembly may from time to time establish. The Supreme Court, consisting of a chief justice and two associates; to be elected by joint vote of both branches of the General Assembly, and to hold their offices for six years.

The constitution also provided in the schedule, that all officers, civil and military, then holding their offices and appointments in the territory under the authority of the United States, or under the authority of the territory, should continue to hold and execute their respective offices and appointments until superseded under the constitution.

The first General Assembly failing to elect Supreme Judges, the territorial judges were continued in office by virtue of the above provision; and no permanent appointments will likely be made until the meeting of the second General Assembly of the state. Previous to the July term, 1847, Chief Justice Mason and Justice Williams resigned, and the governor appointed Judge Williams, chief justice, vice Judge Mason, and John F. Kinney, Esq. associate justice, vice Judge Williams, resigned. And the July term was held by Judges Williams, Wilson, and Kinney. Since that time Judge Wilson has resigned, but the vacancy had not been filled when this volume went to press.

JUDGES AND OFFICERS

OF THE SUPREME COURT, AT JULY TERM, 1847.

Hon. JOSEPH WILLIAMS, Chief Justice.
" THOMAS S. WILSON, } Associate Judges.
" JOHN F. KINNEY, }

Clerk — GEORGE S. HAMPTON.
Reporter — EASTIN MORRIS.

DISTRICT JUDGES

OF THE STATE OF IOWA.

First District—GEORGE W. WILLIAMS, Fort Madison.
Second " JAMES GRANT, Davenport.
Third " CYRUS OLNEY, Fairfield.
Fourth " JAMES P. CARLETON, Iowa City.

ROLL OF ATTORNEYS

OF THE

SUPREME COURT OF THE STATE OF IOWA,

WITH

THEIR PRESENT RESIDENCES, AS FAR AS ASCERTAINED.

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H. B. Hendershot,	Ottumwa.

TABLE OF CASES.

Aiken *v.* Appleby, 8
Anderson *v.* Brown, 158
Anderson *v.* Cameron *et al.* 436

Brazelton *v.* Jenkins, 15
Bell *v.* Pierson, 21
Ballard *v.* Ridgley & Billon, 27
Bradford *v.* Commissioners of Jackson, 218
Burge *v.* Burns & Snyder, 287
Bernard *v.* Parvin, 309
Bush *v.* Elson, 316
Battelle *v.* Bridgman & Co. 363
Bennett & Co. *v.* Davis, 364
Burkadink *v.* Baker, 442
Bruce & Lingle *v.* Sweatland, 494
Benedict *v.* Weston, 490
Bissell & Emmons *v.* Fales, 491

Chapman *et al.* *v.* Allen, 23
Creighton *v.* Gordan, 41
Commissioners of Jefferson *v.* Fox *et al.* 48
Cane *et al.* *v.* Watson, 52
Carothers *v.* [illegible]lick, 54
Chambers *v.* Lathrop, 102
Cochran & Ober *v.* Glover, 151
Colcord & Sprague *v.* Funck, 178
Chalfont *v.* U. S. 214

Cropper *v.* U. S. 259
Cox and wife *v.* Bunker and wife, 269
Cravens *v.* Cravens, 285
Chord *v.* M'Coy, 311
Cornelius *v.* M'Ilvaine, 218
Coe *et al.* *v.* Hamilton, 319
Clark *v.* Gibson, 328
Coutch & Kinsman *v.* Barton, 354
Clark *v.* Parvin, 371
Clark *v.* O'Loughlin, 375
Culbertson & Finch *v.* Tomlinson, 404
Carothers *v.* Green, 429
Child & Co. *v.* Risk, 439
Cunningham *v.* Depew *et al.* 463
Chadwick *v.* Brown, 492
Chaney *v.* Ostrander, 493

Decker & Co. *v.* Birhap, 62
Davis *v.* Morford *et al.* 99
Davis *v.* Brady & Co. 101
Donnel *v.* U. S. 141
Davis & Whicher *v.* Com's of Muscatine, 160
Doolittle *v.* Harrington, 226
Dollarhide *v.* U. S. 233
Davidson *v.* Wheeler, 238
Dice *v.* Yarnel, 241
Daugherty *v.* Bridgman and Partridge, 295
Deshler *v.* Foster, 403
Darlington *v.* Irwin, 421
Dickenson *v.* Chase *et al.* 492

Edgar *v.* Caldwell, 434

Fike *v.* U. S. 30
Freeman *v.* Holliday, 80
Faulkner *v.* Campbell, 148
Fitch *v.* Richardson, 245
Fulwider *v.* Wilford, 323
Farber *et al. v.* Levi, 372
Fanning *v.* M'Craney, 398

Gordon & Washburn *v.* Higley, 13
Griffey *v.* Payne, 68
Gordon & Washburn *v.* Janney & Co. 182
Gordon & Tannahill *v.* Atkinson, 195
Gray *v.* Phillips, 430
Gardner *v.* Able. 489

Harrell *v.* Stringfield, 18
Harlan & Duncan *v.* Sigler, 39
Hight *v.* White, 45
Hill *v.* Smith *et al.* 70
Holmes, Brown & Co. *v.* Mallet, 82
Helmich *v.* Johnson, 89
Hudson *v.* Matthews, 94
Holmes *v.* Wright, 100
Hardman *v.* Chamberlin, 104
Hall *v.* Biever, 113
Hickok & Ross *v.* Labussier, 115
Hughes *v.* M'Cutchen, 154
Hotchkiss *v.* Thompson, 156
Humphreys *v.* Bridgman & Co. 167
Harless & Adams *v.* U. S. 169
Houston *v.* U. S. 174
Hendershott *v.* Thompson, 186
Hodgen *v.* U. S. 218

Humphreys *v.* Snyder, 263
Hurd *v.* Dutchess Co. Bank, 291
Humphreys *v.* Humphreys, 359
Hughell *v.* Wilson, 383
Hight *v.* U. S. 407
Huff *v.* Jennings, 454
Hampton *v.* Pearce, 489
Hampton *v.* U. S. 489

Inghram *v.* Dooley *et al.* 28

Jefferson Co. Commissioners *v.* Fox *et al.* 48
Johnson *v.* Smith, 105
Jackson *v.* Fletcher & Butler, 230
Jones *v.* Fanning, 348
Johnson *et al. v.* U. S. 423
Jenkin *v.* M'Cully, 447
Jones *v.* Donahoo, 493
Jennison *v.* Foltz, 490

Koons *v.* Dyer, 93
King *v.* Wall, 187
Knight *v.* Fox, 305
Key *v.* Isett *et al.* 388
Kerr *v.* Stuart, 433

Long *v.* Long, 43
Lorton *v.* Agnew, 64
Levi *v.* M'Craney, 91
Lyon *v.* Smith, 184
Lewis *v.* U. S. 199
Lorimier *et al. v.* Bank of Illinois, 223
Levi *v.* Thompson, 235
Lorimier & Waller *v.* Lewis *et al.* 253
Lowe & Hickok *v.* Ganby, 281
Lucas *v.* Waller, 303
Long *v.* Long, 381

Long *v.* Long, 458
Longacre *v.* Simpson, 495
Lucky *v.* Pepper, 490

Maltby & Bolls *v.* Cooper, 59
Meldrum *v.* Clark, 130
Miller & Faulkner *v.* M'Guire, 150
Matthews *v.* Tally, 159
Madera *et el. v.* Jones, 204
M'Kell *v.* Neil and wife, 271
M'Connell *v.* Gardner, 272
Marshall & Whitesides *v.* Bush, 275
Meigs *v.* Parker, 378
Moore *v.* Ross, 401
M'Knight & Maloney *v.* U. S. 444
M'Donald *et al. v.* Lightfoot, 450
Margrave *v.* U. S. 452
Musgrave *v.* Brady *et al.* 456
Miners' Bank of Dubuque *v.* U. S. 482
M'Cauley *v.* U. S. 486
Mattoon *v.* Vanater, 492
M'Daniel *v.* Spencely & Harker, 493

Neil *v.* Neil, 491

O'Sullivan *v.* Brown, 494

Powell *v.* U. S. 17
Porter & Brazleton *v.* Moffett, 58
Porter & Brazelton *v.* Moffett, 108
Pierson *v.* Steortz, 136
Porter & Brazelton *v.* Moffett, 153
Porter *v.* Lane, 197
Parvin *v.* Hoopes, 294
Petriken *v.* Davis, 296
Perry & Headley *v.* Benner, 340
Phillips *v.* Runnels, 391
Parker *v.* Stewart, 419
Peck *v.* Ayres, 493
Porter *v.* Cox, 494
Pelton *v.* Jones, Bacon & Co. 491

Ralph, in matter of, 1
Rigglesworth *v.* Reed, 19
Romaine *v.* Com'rs of Muscatine, 357
Remsey *v.* Duke, 385
Roberts *v.* Smith & Halferty, 417
Roberts *v.* Smith & Halferty, 426

Sleeth *v.* Cutler, 56
Strang *v.* Wilson, 84
Smith *v.* Ralston, 87
Settle *v.* Henson, 111
Sater & Wade *v.* Hendershott, 118
Stannard *et al. v.* M'Carty, 124
Scott *et al. v.* U. S. 142
Snyder *v.* Roper, 229
Stuart *v.* Kerr, 240
Switzer *v.* Gowdy, 248
Smith *v.* Smith & Johnson, 300
Sleeth *v.* Murphy, 321
Sage & Co. *v.* Keesecker *et al.* 338
Swan, Com'r *v.* Ewing *et al.* 344
Stratton *v.* Shintaffter, 420
Shuffleton & Pitzer *v.* Jenkins, 427

Starr & Burgess *v.* Wilson, 438
Sheppard *et al. v.* Wilson, 448
Smith *v.* Barrett, 492
Simmons *v.* U. S. 490

Temple *v.* Hays & Hendershott, 9
United States *v.* Com'rs of Dubuque, 31
United States *v.* Lapoint *et al.* 146
United States *v.* Ross, 164
" " " Cropper, 190
" " " Everest, 206
" " " Switzer, 302
" " " Hiler, 330
" " " Morgan, 341
" " *ex. rel.* Jones *v.* Fanning, 348
United States *v.* Dickey, 412

Van *v.* Manning, 491

Wallis *v.* Sparks, 20
Wilkie & Tuller *v.* Jones, 97
Wilson *v.* King, 106
Woods & Hobert *v.* Morgan, 179
Walker & Eno *v.* Ayres, administrator, 200
Wright *v.* Antrim, 258
Wright *v.* Britton, 286
Wilson *v.* Webster, 312
Webb & Thurston *v.* Mauro, 329
Wau-kon-chaw-neek-kaw *et al. v.* U. S. 332
Warburton *et al. v.* Mattox *et al.*, 367
Wyatt *v.* Bailey, 396
Wilford *v.* Miller, 405
Wright *v.* Shuck, 425
Woods *v.* Com'rs Van Buren, 441
Wilson *v.* Hughell, 461
Webster *v.* Reid, 467
Webb & Thruston *v.* Mauro, 488
West *v.* Hatfield, 493
White *v.* Mallord, 494

Young & Snyder *v.* Isett, 460
Zickafosse *v.* Hulick, 175

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF IOWA.

JULY TERM, 1839.

HON. CHARLES MASON, CHIEF JUSTICE.
" JOSEPH WILLIAMS, } ASSOCIATE JUDGES.
" THOMAS S. WILSON, }

In the matter of RALPH (a colored man), on Habeas Corpus (a).

Where a slave goes with the consent of his master to become a permanent resident of a free state, he cannot be regarded as a fugitive slave.

The act of 1820, for the admission of Missouri into the Union, which prohibits slavery north of 36 deg., 30 min., was not intended merely as a naked declaration, requiring further legislative action to carry it into effect, but must be regarded as an entire and final prohibition.

The master who, subsequently to this act, permits his slave to become a permanent resident here, cannot afterwards exercise any acts of ownership over him within this territory.

Ralph, being within this territory, was claimed by Montgomery, a resident of Missouri, as his slave, and by virtue

---

(a) The questions involved in this case are no longer of any great practical importance. The distinction between *free* and *slave states* within the Union no longer exists; for within its bounds all are now free. No *slave* can tread the soil or breathe the air of free America.

of a precept from a justice of the peace, and certain proceedings pursuant to statute being had before him, the sheriff of Dubuque county delivered the negro into the custody of the claimant, for the purpose of being transported to Missouri.

Ralph was afterwards brought before the Judge of
*2 the 3d District by a *writ of *habeas corpus*, from whence, by consent of parties, the proceedings were transferred to the Supreme Court upon an agreed state of facts, in substance as follows:

That in 1834, Ralph being the slave of the claimant, a written agreement was entered into between them, by which Ralph was permitted to come into this territory to reside — he, on his part, stipulating to pay the claimant the sum of $550 with interest from the 1st of January 1835, as the price of his freedom; that it was to earn the purchase money for his freedom that he then left Missouri and came to Dubuque, where he remained, working in the lead mines, until the time of the proceedings before the justice, and that having failed to comply with his contract of payment, he was reclaimed by his former master.

ROREB, for the claimant, contended,

1. That Ralph, being a resident of the territory of Wisconsin, at the time both of the PASSAGE AND TAKING EFFECT of the organic law of that territory — and also a resident of Iowa territory, at the time of the passage and taking effect of the organic law of Iowa territory, he became FREE by operation of the 12th section of said organic laws, which expressly extend to the inhabitants of said territories of Iowa and Wisconsin, the benefits of the articles of compact contained in the ordinance for the government of the territory north-west of the river Ohio, by which the benefit of the writ of *habeas corpus* (the remedy here sought) is guaranteed to the inhabitants of said territories

north-west of Ohio — and which also declares, "No man shall be deprived of his liberty, or property, but by the judgment of his peers, or the law of the land." See 2d article of compact, contained in the ordinance of Congress of 1787. And that "There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes whereof the parties shall have been duly convicted." See 6th article of said compact.

2. That, independent of the articles of compact and organic laws above cited, Ralph became free so soon as, by consent of his master, he became an inhabitant of what is now the territory of Iowa, by virtue of the act of Congress, entitled, "An act to authorize the people of Missouri territory to form a constitution and state government, and for the admission of such state into the Union, on an equal footing with the original states, and to prohibit slavery in certain territories," by which it is declared, that

"In all that territory ceded by France to the *United *3
States, under the name of Louisiana, which lies north of thirty-six degrees and thirty minutes north latitude, not included within the limits of the state contemplated by this act, slavery and involuntary servitude, otherwise than in the punishment of crimes, whereof the parties shall have been duly convicted, shall be, and is hereby, forever prohibited." See 8th Section of said Act. Ing. Digest of Laws of U. S. of America, 614. That the present territory, being part of the country subjected to such prohibition, the petitioner, as there is no law by which he can be removed elsewhere, is FREE in the exercise of his right to remain here. Where a West India slave came to England with his master, and again returned with him to the West Indies, it was held, that although he was still subject to servitude on his return to the Indies, yet "no coercion could be exercised over him while in England." 2d Hagg. Adm. Rep. 94; 2d Kent's

Com. note to page 249. The claimant cannot possess any natural right to remove the petitioner to where he may, by the aid of human law, be reduced again to slavery; for such a state is declared to be "repugnant to reason and the principles of natural law." See Blac. Com. vol. 1st, p. 423.

And still stronger is the language of much earlier and higher authority; in the divine writings of Moses, it is said, "Thou shalt not deliver unto his master the servant which is escaped from his master unto thee," &c., 22d Chap. Deut. 15th verse. But this is not a case of an "escape," but emigration by consent of the master.

3. That he cannot be considered as either coming into, or remaining in, the territory, in violation of the law prohibiting persons of color from settling in this territory, without evidence of freedom, &c.; for it is in evidence that he was here at the time of, and previous to, the organization of the territorial government, and even at the time of the first extension of civil government over the country, by the act of Congress of 1834, attaching it to the then territory of Michigan for temporary government.

4. That he cannot be reclaimed and delivered over to his former owner under our statute, nor under the laws, ordinance, or constitution of the United States, providing for the re-taking of fugitive slaves who have escaped from service; for it is in evidence that he came to, and remained in, the territory, not as a fugitive from service, to which he was then legally holden in some state of the Union, but by the voluntary consent and agreement of his former owner, the present claimant.

5. That the claimant, Montgomery, by permitting his slave to come to that portion of the territory of the
*4 United States in which slavery was *then, and still is, prohibited, for the purpose of remaining indefinitely, virtually manumitted such slave; that the very fact of his contracting with, presupposes a state of freedom on

the part of, the slave; that if Montgomery has any relief, it is on that contract, for the money agreed to be paid, which is neither conceded here, nor deeemed in any manner essential to the adjudication of this question, which is a question entirely of freedom.

Lee *v.* Lee, 8 Peter's Rep. 44; Fanny *v.* Montgomery and others, Breese's Reps. 188; Act of Virginia for cession of Northwest territory, 5th vol. Laws U. S. A. 473; John Merry *v.* Tiffin and Menard, 1 vol. Misso. Rep. 725; Winny *v.* Whitesides, *ib.* 472; Ralph *v.* Duncan, 3d Misso. Rep. 194; Julia *v.* Samuel McKinney, *ib.* 270; 1st Blac. Com. 127; *ib.* 423, 424, 425; 2d of Kent's Com. 247, 248, 249; Case of Somerset, 11 vol. State Trials, p. 339; Lofts' Reps. 1; Case of Knight, a negro slave, in 1778; Kame's Principles of Equity, vol. 2d, 134.

Learned & Berry, for Montgomery, insisted,

1st. That Ralph, having failed to perform his part of the contract, by paying the price of his freedom, was to be regarded as a fugitive slave, and as such might be claimed by virtue of the act of Congress.

2. That slavery was not prohibited in this territory, the act of 1820, for admitting Missouri into the Union, which contained a prohibition of slavery north of 36 deg., 30 min., not being intended to take effect on the rights of individuals without further legislative action, but merely meant to direct the local legislatures to pass laws prohibiting slavery within the described limits; that the act of Congress contained no sanction, and, consequently, had no binding force; that even if the act was intended to operate without further legislation, it did not work a forfeiture of slave property, and would in this case go no further than merely to require the claimant to remove his property out of the territory; that the case was similar in some respects to that of property invested in private banking, contrary

to the provisions of the statute, where, although the owner might be made liable, the property would not be confiscated.

By the Court, Mason, Chief Justice.—This case does not come before us in any of the ordinary methods of application to an appellate Court, so that it is, perhaps, not strictly regular for us to entertain jurisdiction of it at all. As, however, it involves an important question, *which may ere long, if unsettled, become an exciting one, and as it is by the mutual assent and request of all the parties interested, we concluded to listen to the argument, and make a decision in the case without intending it as a precedent for the future practice of this Court.

*5

The petitioner, a colored man, who was claimed as a slave before the justice of the peace, and who was about to have been delivered up accordingly, asserts that he is free. If this be actually the case, the writ of *habeas corpus* was properly brought, being the only means by which the Judge of the District Court could exercise a remedial control over the illegal acts of justices of the peace, in cases like this. The proceedings having been transferred to this Court, it will be proper for us to make such a disposition of the matter as might have been made by the District Judge while the subject was before him.

The claimant asks that the petitioner be restored to him as a slave, and principally for the following reasons:—In the first place, that, by the act of Congress of 1820, which authorized the people of Missouri to form a constitution and state government, and which prohibited slavery in all that portion of the old Louisiana territory lying north of thirty-six degrees and thirty minutes of north latitude, not included within the then contemplated state, it is provided, "That any person escaping into the territory thus set apart, from whom labor or service is lawfully claimed in any state or territory of the United States, such fugitive may lawfully be reclaimed and conveyed to the person

claiming his said labor or services." Under this provision, we are called upon to decide that the petitioner is a fugitive slave, because, although the master consented that he should come to this territory, and for aught that appears, remain here for four or five years, still there was an express stipulation that he should, at some future time, pay to his former master, the sum of five hundred dollars, with interest; that, not having complied with this agreement, he is to be regarded as being here without permission, and, consequently, as having escaped into the territory.

Such a construction would introduce almost unqualified slavery into all the free states. The constitution of the United States contains a provision in relation to fugitive slaves, substantially the same as that embraced in the act of Congress above referred to; so that in this particular, all the free states of the Union are in the same predicament as this territory. Suppose, then, the southern master should permit his slave to emigrate to some of the free states, upon the express condition that he should remain forever the slave, or (which is the same thing) the submissive servant of some particular individual, his heirs and assigns. *While he fulfils this agreement, he is a slave *6 to his new master in the North, and as soon as he violates it, he becomes again the slave of his old one, at the South, who may, forthwith, reclaim him as a fugitive. We cannot countenance such a doctrine.

From the facts agreed upon in this case, it seems that the claimant permitted his slave to come to this territory. The permission seems to have been absolute; but there was also an understanding that the latter was to pay the former a certain amount, as the price of his freedom. How the failure to comply with this understanding could render a removal, undertaken with the master's consent, an escape, we are unable to comprehend. The petitioner is under the same obligation to fulfil this engagement as though, instead of its being the price of his freedom, the debt had

been incurred for the purchase of any other species of property. It is a debt which he ought to pay, but for the non-payment of which no man in this territory can be reduced to slavery.

We did not say there can be no escape where the slave goes to a free state by the consent of the master: If, sent upon an errand, or traveling in company with his master, he should refuse to return, he might probably be regarded as a fugitive. But this certainly cannot be the case where the journey was undertaken with the understanding of all parties that the slave was going to become a permanent resident of the free state or territory.

But it is contended, on the part of the claimant, that slavery is not prohibited in this territory; that the act of 1820, above mentioned, is a mere naked declaration, requiring further legislation to render it operative, that it merely imposes a duty on the states and territories to be formed within the prescribed limits, but that, without further action on the subject, the law has no sanction, and, consequently, no force. This position, we think, cannot be maintained. Congress possesses the supreme power of legislation in relation to the territories, and its right to prohibit slavery, at least in relation to slaves subsequently introduced, is doubtless legitimate. Has that right been exercised in relation to this territory? The language of the act of 1820, in relation to the district of country in which this territory is embraced is, that slavery therein "shall be, and is hereby, forever prohibited." This seems to us an entire and final prohibition, not looking to future legislative action to render it effectual.

But it is said that, although the act may prohibit slavery, it does not declare a forfeiture of slave property, and that the most which the law will authorize will be, to re-
*7 quire the master to remove that *property out of the territory. It is true that the act thus mentioned does not, in express terms, declare a forfeiture of slave

property, but it does, in effect, declare that such property shall not exist.

The master who, subsequently to that Act, permits his slave to become a resident here, cannot afterwards exercise any acts of ownership over him within this territory. The law does not take away his property in express terms, but declares it no longer to be property at all. Of course those legal remedies, which can only be resorted to upon the presumption of a still subsisting ownership in the master, become altogether annihilated.

A wide difference exists between the present case and that supposed in the argument, of an act of the legislature prohibiting private banking. In the latter case the property invested in that traffic, in violation of the law, would not, in general, become forfeited. But suppose, that, instead of prohibiting the investment of property in private banks, the act should declare that property so invested should cease to be the subject of property at all (and suppose a physical capability in the law to carry out that declaration), could the former owner, after such investment, invoke the aid of the laws to restore him what had once been his, but which was now, like the air, rendered incapable of being appropriated by any one? Such is precisely the state of things in the case now before us. Property, in the slave, cannot exist without the existence of slavery; the prohibition of the latter annihilates the former, and, this being destroyed, he becomes free.

Could the claimant, in this case, retain the custody and control of the petitioner without invoking the aid of our laws, and without their violation, we certainly should not interfere to prevent him. But, when he applies to our tribunals for the purpose of controlling, as property, that which our laws have declared shall not be property, it is incumbent on them to refuse their co-operation. When, in seeking to accomplish his object, he illegally restrains a human being of his liberty, it is proper that the laws, which

should extend equal protection to men of all colors and conditions, should exert their remedial interposition. We think, therefore, that the petitioner should be discharged from all custody and constraint, and be permitted to go free while he remains under the protection of our laws.

CASES

ARGUED AND DETERMINED.

IN THE

SUPREME COURT OF IOWA.

DECEMBER TERM, 1839.

HON. CHARLES MASON, CHIEF JUSTICE.
" JOSEPH WILLIAMS, } ASSOCIATE JUDGES.
" THOMAS S. WILSON, }

JOHN AIKEN, *et al.* *v.* JOHN APPLEBY.

Error to Lee.

Upon the agreement to leave premises on receiving ten days notice, ten full days must elapse, exclusive of that on which notice is given, before action can be instituted to expel the tenant from the premises (*b*).

BY THE COURT, MASON, CHIEF JUSTICE. — From the bill of exceptions in this case, it appears that the defendant was tenant of the plaintiffs, under a condition that he should at any time leave the premises upon receiving ten days notice. That such notice was served upon him on the last day of April, 1838, and that suit was commenced against him on the tenth of May following. The Judge of the District Court charged the jury, that ten full days must

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(*b*) Richardson *v.* B. & M. R. R. Co. 8 Iowa, 260; Dilts *v.* Ziegler, 1 Gr. 164; Carleton *v.* Byington, 16 Iowa, 588; Robinson *v.* Foster, 12 Iowa, 186; Rev. § 4121.

elapse, exclusive of the day on which notice was given, before an action could be legaliy instituted against him, to expel him from the premises; and that, consequently, the action was prematurely commenced. This is the error complained of.

Suppose a notice of only one day had been requisite. Could the suit have been legally commenced on the first day of May? We think not. The law disregards fractions of a day. It matters not what hour of the day, therefore, the notice was served, if, under such circumstances, the action might have been commenced on the first day of May, the rule of law must be general. Notice might, therefore, be given on the evening of the last day of April, and suit commenced early on the following morning. This is clearly unreasonable; for, when the tenant stipulates for one days notice, he should have at least one full day. Where one days notice is necessary, and that notice was given on the last day of April, if suit could not be commenced until the second day of May, then if ten days notice had been requisite, under like circumstances, the action could not legally be brought until the eleventh day of May. The Judge of the District Court, therefore, charged the jury correctly, and the judgment must be affirmed.

Judgment affirmed, accordingly.

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*9 *GEORGE TEMPLE *v.* HAYS & HENDERSHOTT.

Error to Des Moines.

(c) A statute may have effect prior to its promulgation.

(c) *On the subject of the taking effect of statutes*, see new Const. art. 3, § 26; Rev. §§ 23, 24, 25, 26, 27, 28; Allen *v.* Dunham, 1 Gr. 89; Roop *v.* Seaton, 4 Gr. 252; Charles & Blow *v.* Lamberson, 1 Iowa, 435; State *v.* Clark, *et al. ib.* 70; Tatcher *v.* Haun, 12 Iowa, 303; Hunt *v.* Murray, *et al.* 17 Iowa, 313; Bartruff *v.* Remey, 15 Iowa, 257.

George Temple *v.* Hays & Hendershott.

(*d*) A promissory note under seal, is negotiable in the same way as other notes not under seal, and the actual holder of such note, endorsed in blank, may bring his action thereon against the maker.

The statutory provision declaring that fraud may be set up against a note in the hands of an innocent assignee, does not apply to a note assigned before that statute took effect. Such defence is not available in the absence of statutes on that subject.

(*e*) Where a note, made payble to "A B, or order," is endorsed in blank, the holder may sue in his own name; or he may sue in the name of A B to his own use.

But in this case, any defence available against A B may be set up against the holder of the note.

Temple made his sealed note, payable to Hays & Hendershott, or order, the latter endorsed it in blank, and suit was instituted thereon by Huntington, the holder, in the name of Hays & Hendershott, for his use.

The defendant pleaded *non est factum*, and on the trial offered to prove fraud in the inception, which was objected to, and the objection sustained by the court.

There were three errors assigned in the case.

1. That the note on which the action was brought, was permitted to go to the jury, without the execution of the same having been proved.

2. That the instrument on which the action was brought did not appear to have been endorsed to the beneficial holder mentioned in the plaintiff's declaration.

3. That the defendant in the Court below offered to prove fraud in obtaining the note originally, to which the plaintiff objected, and the objection was sustained by the Court.

(*d*) Private seals, and the difference between sealed and unsealed instruments, are abolished by statute. Rev. § 1823.

(*e*) Rev. § 2757; Conyngham *v.* Smith, 16 Iowa, 471; Farwell *v.* Tyler, 5 Iowa, 555; Fear *v.* Jones, 6 Iowa, 169; Sheldon *v.* Middleton, 10 Iowa, 47; Cottle *v.* Cole & Cole, 20 Iowa, 485; Rice *v.* Savery, 22 Iowa, 470. *The words "for the use of another" regarded as surplusage*, State *v.* Butterworth, 2 Iowa, 158; Scott, for the use, &c. *v.* Granger, 3 Iowa, 447.

These assignments of error were now argued by GRIMES, for the plaintiff, and ROBER & STARR, for defendants.

GRIMES, for the plaintiff, contended, that where the beneficial holder instituted a suit in the name of the original obligee, the obligor has a right to the same defence as though the bond were not endorsed. The defendant can, under the plea of *non est factum*, introduce evi-
*10 dence of *fraud in the inception of the contract, and in obtaining the bond. 4 Esp. C. 9, Basten *v.* Butler; 7 East. R. 479; Farnsworth *v.* Carrard, 1 Camp. 48; *ib.* 190; 2 Taunt. R. 2; 2 Str. 79; *ib.* 264; Hatton *v.* Morse, 1 Salk. 394; 8 T. R. 147; 2 B. & A. 96; 1 Ch. Pl. 479–80; Iowa Stat. p. 383, 6th sec.

BY THE COURT, MASON, CHIEF JUSTICE.— This case comes up on a bill of exceptions, and the first exception taken in that bill, to the decision of the Court below, is that the note upon which the action was brought, was permitted to go to the jury without the execution of the same having been proved.

It is admitted that we have a statute dispensing with the necessity of proving the signature in a case like this, unless the defendant, his agent, or attorney, will deny the same under oath; but it is contended that this statute was not in force at the time of the trial below. The act was approved January 4th, 1839, and by one of its provisions it is declared that it shall take effect and be in force from and after the first day of March (then) next. The trial took place in May, more than two months subsequent.

But it is said that the law in question had not been published at the time of the trial in May, and, therefore, it was not in the power of the legislature to give it force and effect. It is a settled rule, that where no time is fixed, a statute takes effect from and after its passage. Matthews *v.* Zane, 7 Wheaton 104; and the case of the brig Ann, 1 Gallison, 62. This must, of necessity, be previous to the

promulgation of the law. For a stronger reason, a statute will take effect at the time fixed by the legislature, where such time is not antecedent to its passage. The mode and time of publishing the law does not determine its validity, how unjust soever it may seem that men should be bound by statutes of which they know not the existence.

The second exception taken in the trial below was, that the instrument on which the action was brought did not appear to have been endorsed to the beneficial holder mentioned in the plaintiff's declaration. There is hardly a rule of law better established, than the actual holder of a promissory note, endorsed in blank, may bring his action against the maker thereof. But it seems to be supposed, that this is not to be treated in this respect as an ordinary promissory note, because it is under seal. The statute declares "that all notes in writing made and signed by any person, or by a factor or agent of any merchant or trader, usually entrusted therewith, whereby such person, or any merchant or trader, by *such factor or agent, *11 shall promise to pay to any other person, body politic or corporate, his or their order, or unto bearer, any sum of money therein mentioned, shall, by virtue thereof, be taken and construed to be due and payable as therein expressed, and shall have the same effect, and be negotiable in like manner as inland bills of exchange, according to the custom of merchants; and that the payees or endorsees of every such note payable to them or their order, shall and may maintain their action for such sum of money against the makers and endorsers of the same, respectively, in like manner as in cases of inland bills of exchange, and not otherwise." Laws of Michigan 344. All notes in writing, made payable to order, are here mentioned as possessing the attributes of negotiability. The instrument declared on in the present case seems to fall within that predicament. The statute does not confine itself to unsealed instruments. We see no good reason, therefore, why its

operation should be suspended by a mere seal attached to an ordinary promissory note, so far at least, as regards any question involved in the present case. There is another reason for coming to this conclusion drawn from expediency. Notes of this kind are almost as common with us as those not under seal. Very few people think of or know the difference, and would be likely to become frequently entrapped were a distinction to be preserved. The legislature, by allowing the consideration of sealed instruments to be inquired into, has obliterated one of the lines of separation. We think the statute above quoted was intended to erase another.

The third point contained in the bill of exceptions is, that the defendant in the Court below offered to prove fraud in obtaining the note originally, to which the plaintiff objected, and the objection was sustained by the Court. For the purpose of sustaining his exception, the plaintiff in error has referred to the laws of Iowa, page 383, by which it is provided that fraud may be set up against a note, even in the hands of an innocent assignee. We do not think this statute will support his position.

It appears that the note in question came into the hands of the beneficial holder, previous to the passage of that statute. The ordinance of 1787 (the benefits of which have been extended to us) declares that "no law ought ever to be made or have force in the said territory, that shall in any manner whatever interfere with, or affect private contracts or engagements, *bona fide* and without fraud, previously formed." This is similar in spirit to the provision in the constitution of the United States, that no state shall pass any law impairing the obligation of

*12 *contracts. Under this clause of the constitution, the rule appears to be well settled, that a state is not prohibited from changing the remedy, or the rules of evidence that shall be brought to bear upon an antecedent contract; but are only restrained from intermeddling with

those contracts themselves, and with the vested rights of the parties thereto. Fletcher *v.* Peck, 6 Cranch, 87; the state of New Jersey *v.* Wilson, 7 Cranch, 164; Sturges *v.* Crowninshield, 4 Wheaton, 122. If, at the time the note in question came into the hands of the present beneficial holder, the law rendered him secure against the effects of fraud in the inception of the note, can the legislature, without contravening the provision of the ordinance of 1787, above referred to, subsequently pass an enactment that shall divest him of his right? Upon obtaining possession of the note, regularly endorsed, he became, by the operation of law, a party to an implied contract with the maker of the note. A contract which, at the time it was made, was valid and binding. The legislature cannot subsequently come in and nullify that contract, for an act which, at the time the present holder obtained possession of the note, was not, as against him, fraudulent. We think, therefore, that the provision in the laws of Iowa, which we have now been considering, can only apply to contracts formed subsequently to the taking effect of that statute.

Independently of that statute, then, what was the law of the case? We find some authorities declaring, in a general way, that fraud renders all contracts void. After a pretty thorough examination of the question, however, we are led to the conclusion that this rule cannot operate to the prejudice of the innocent assignee. 1 Maddock's Chancery, 154; 4th Petersdorff, 330; Chitty on Bills, 90; 3 Kent's Commentaries, 51, 1st edition; and Brown *v.* Mott, 7 Johnson's Reports, 360; and that as against him, fraud in the inception of the note cannot be set up.

But there is another very material feature in this case, which is that the suit was brought in the name of Hays & Hendershott, the very persons against whom the defendant offered the proof of fraud, and for the rejection of which evidence, the exception we are now considering was

taken. The question here arises, whether, if the beneficial plaintiff chooses to bring his action in the name of the payee, the maker cannot avail himself of any defence which would have been valid, had the payee sued for his own benefit. Where a *chose in action* is not negotiable it may still be transferred, and a suit may be brought for the use of the beneficial holder, in the name of the original payee.

But in that case the defendant may resort to any de-
*13 fence which would have been *available had there been no transfer. Chitty on Bills, 90. The principle in the present case is nearly the same. The only direct authority which we have been able to find on the subject is that of Hartwell *v.* McBeth, 1 Harrington's Rep. 363. In that case the Superior Court of the state of Delaware decided that, on a promisory note endorsed in blank, suit might be brought in the name of the payee, for the use of the beneficial holder, but that in such a case, want of consideration would be a valid defence. We see no reason for a contrary course, sufficient to induce us to decide in opposition to this authority. We are, therefore, of opinion that the Judge of the District Court erred in rejecting the evidence offered, as stated in the bill of exceptions, and that the judgment below should be reversed.

Judgment reversed, accordingly.

Gordon & Washburn *v.* Higley.

Error to Muscatine.

The District Court may direct such a change in the verdict of the jury as to make it correspond to the usual forms, where such change does not alter the evident meaning of such verdict.

This may be done without the consent of the jury, and is, therefore, proper after their separation (*f*).

This action was commenced in a Justice's Court, and brought from thence into the District Court of Muscatine county by appeal. The transcript of the justice showed that the action was assumpsit, and that the parties went into trial without setting out any formal issue, and there is no evidence of an issue having been made up in the District Court.

On the trial in the District Court, the jury returned their verdict as follows: "Verdict for the plaintiff, forty-four dollars and seventy-nine cents." A motion in arrest of judgment was thereupon made and overruled. After which, the Court directed the clerk to change the phraseology of the verdict, so as to make it correspond to the usual form in an action of assumpsit. This was done after the separation of the jury. This was the principal error relied upon.

*Rorer, Starr & Mitchell, for plaintiff in error, *14 cited 2 Wheat. 225, Patterson *v.* United States.

Grimes, for deft. in error, cited 2 Strange, 1197, 1 Wils. 33; 3 Term. Rep. 749; 2d Doug. 739; 4 Pick. Rep. 446; White *v.* Snell, 9 Pick. Rep. 16; Grant on new trials, 85; Usher *v.* Dansey, 4 M. & S. 94; Rex *v.* Hays, 2 Strange, 842; Clark *v.* Lamb, 6 Pick. 512, and 8 Pick. 415.

By the Court, Mason, Chief Justice.—The only question presented in this case is, whether the Court below was right in directing the alteration of the verdict. It is contended by the counsel for the plaintiff in error, first, that the record does not show the nature of the original action,

(*f*) Rev. §§ 3084, 3085; Cassell *v.* Western Stage Co. 12 Iowa, 47; Stewart *v.* Campbell, 7 Iowa, 538; McGregor *v.* Arnold, 2 Iowa, 30; Fromme *v.* Jones, 13 Iowa, 474; Hamilton *v.* Barton, 20 Iowa, 505; Morrison *v.* Overton, *ib.* 465; State *v.* Turner, 19 Iowa, 144.

so that the District Court had no legitimate guide in assimilating the verdict to any of the approved technical forms, and, in the next place, that, though the District Court has authority to correct mere clerical errors in entering the verdict of the jury, it has none to change that verdict itself, even in matter of form.

In the return of the justice, this action is styled an action of assumpsit. The proceedings in the Justice's Court are not fully set out in the transcript. Enough, however, appears there to prevent all doubt as to the nature of the action. Any formal defect, in this particular, should have been remedied (if at all) in the District Court. The statute in relation to appeals declares, "that upon the return of the justice being filed in the clerk's office, the court shall be possessed of the cause, and shall proceed to hear, try, and determine the same anew, without regarding any error, defect, or other imperfection in the proceedings of the justice. Laws of 1837–8, p. 176. This Court cannot countenance objections founded on defects which might have been corrected in the Court below, and of which, even without such correction, no advantage could there have been taken. We must, therefore, regard this case as though it had been an action of assumpsit, regularly brought and conducted.

We think, also, that the Court below was right in directing the alteration of the verdict. No form of expression could have more explicitly revealed the intention of the jury than that by them adopted. We are not now called upon to decide whether any precise form of words is necessary in a case like this; but, at all events, we think it perfectly proper for the District Court to direct such a change in the language of the jury as to make their
*15 verdict correspond to the usual forms, *whenever such change cannot, by possibility, alter the evident meaning of their verdict. This may be done without the consent of the jury, or even should they positively object,

and is, therefore, perfectly proper after their separation.

In coming to this conclusion, we are not unsupported by authority. The Supreme Court of the state of New York, (7 Cow. 29) have decided that, in an action of replevin, where the jury merely found "for the plaintiff," it was proper for the Court to allow "six cents costs," and "six cents damages," to be added to the verdict by the clerk, "it being a mere matter of form, and incident to the finding of the jury." This was not the correction of a mere clerical error, but the actual finding of the jury was changed by the direction of the Court. We are, therefore, of opinion that the decision of the court below should be sustained.

Judgment affirmed.

Samuel Brazelton *v.* Warren L. Jenkins.

Error to Henry.

This Court has no power to examine into errors in fact, occuring in the Court below, and not appearing on record.

An erroneous decision of the Court below on an applicetion for a new trial, may be brought here for review and correction, but for this purpose a strong case must be presented (*g*.)

This was an action of trespass *vi et armis*, brought by Jenkins against Brazelton, in the District Court of Henry county. The jury found the defendant guilty, and assessed the damages at one hundred and fifty dollars.. The

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(*g*) Rev. § 3112; Jourdan *v.* Reed, 1 Iowa, 135; Stewart *v.* Ewbank, 3 Iowa, 161; State *v.* Tomlinson, 11 Iowa, 401; Lodge *v.* Reznor, 13 Iowa, 600; McKay *v.* Thorington, 15 Iowa, 25; Denton *v.* Lewis, *ib.* 301; Jones *v.* Jones, 19 Iowa, 235; Gimble *v.* Ackley, 12 Iowa, 27; Freeland *v.* Muscatine, 9 Iowa, 461; see, also, new Const. art. 5, § 4.

trial took place in Nov., 1838. In June, 1839, affidavits were taken, to be used in the Supreme Court, tending to show that the jury in making up their verdict in the case, had each marked down the amount of damages he wished to render, the sum of which, divided by twelve, was, in consequence of a unanimous previous pledge to that effect, taken as their verdict. This fact, however, was not presented to the District Court, as a basis for the motion for a new trial. The only reasons set forth in that mo-
*16 tion were: 1st. That the damages *were excessive, and 2d. That the defendant below had been induced not to be personally present at the trial, by reason of an observation of the plaintiff's attorney. This last fact, however, was not sustained by affidavit, and it appears that the defendant's attorneys were present at the trial, and defended the suit.

By the Court, Mason, Chief Justice. — The first and principal question to be decided in this case is, whether we can, on writ of error, examine into any errors in fact, in the Court below, which do not appear upon the record. The cases cited show, that the Supreme Court of the state of New York correct errors of this nature. Those cases, however, also show that this power results from the broad extent of jurisdiction conferred upon the Court by statute. The practice in England seems, in this respect, similar to that in New York, and for a like reason.

Our powers, in this particular, seem rather more narrow and limited. The statute seems to confine our remedial control over the District Courts by writs of error, to matters of law. Laws of 1836, p. 23.

But the principal reason why errors in fact cannot be corrected in this Court is, that we have not the power to try any issue that might be joined thereon. The Supreme Court of the State of New York can issue a *venire* to try questions of fact of this nature, which can only be tried by

a jury. Arnold *v.* Sanford, 14 Johnson's Reports, 422. This seems one of the chief arguments relied upon, in that case, for deciding that errors in fact might be corrected in that Court. It would seem, from the English books, that error in fact in an inferior Court cannot be corrected in the House of Lords, or in the Exchequer Chamber, because in neither of those Courts can there be a trial by jury. Such is the case with us. The act of Congress organizing this territory (section 9) declares that, in no case removed here from the District Court, shall a trial by jury take place in this Court. And the law makes no provision for sending an issue down for trial to the District Court. Upon the principles acted on by the Courts of other countries, therefore, it would seem impossible for us to correct the error in fact, complained of in this case. That cases of this nature may arise, involving the greatest degree of hardship and injustice, and which will be altogether remediless in a Court of law, may readily be imagined. But the remedy must be applied by the wisdom of the legislature, rather than by the discretion of the Court.

But it is said that the pleadings in this case are such as to dispense *with the necessity of a trial by jury. *17 That the plea of the defendant in error is tantamount to a demurrer, and confesses every error in fact which is well assigned. This may all be true, but still, if, as a general rule, we are not authorized to take cognizance of, and to correct errors in fact, we cannot found so important a branch of jurisdiction upon a particular, and perhaps accidental, state of pleading.

Besides, by the authorities on this subject, it seems to be settled that the plea of the defendant in error in this case only confesses those errors in fact, which are well assigned. If we cannot entertain questions of that nature, can any errors in fact ever be well assigned?

Another error assigned is, the refusal of the Court below to grant a new trial. There is no doubt but that an erro-

neous decision of the Court below, on an application for a new trial, may be brought up here for review and correction, for such a power appears to be conferred by statute. Laws of 1836, p. 23. But as this is a question principally addressed to the discretion of the Court below, a strong case must be presented to authorize the interposition of this Court. The present case does not seem to us one of that nature. The grounds upon which the application for a new trial was founded are, first, that the damages were excessive; second, that the defendant was misled by an observation of the attorney for the plaintiff below, by reason of which he was absent from the trial. There is nothing before us from which we can infer either that the damages were excessive, or that the defendant below had any sufficient reason for neglecting to prepare for the trial. We, therefore, think that the judge of the District Court, in overruling the motion for a new trial, did not transgress the limits of a sound legal discretion. The judgment of the Court below is, therefore, affirmed.

Edward Powell *v.* The United States.

Omission of an arraignment will be a sufficient ground for reversing a judgment (*h*).

By the Court, Mason, Chief Justice. —The first error assigned in this case is, that there was no plea pleaded by the defendant below, previous to the trial. It is not absolutely necessary in all cases that the defendant should
*18 actually plead. He will presume to plead not *guilty, even if he should stand mute, especially in capital cases. But it is a general rule that the total want or omis-

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(*h*) See Rev. of 1860, title "Arraignment," chap. 201, p. 800.

sion of an arraignment will be a sufficient ground for reversing a judgment. 1 Chitty's Criminal Law, p. 418. Had the record stated that the defendant had regularly appeared and pleaded, an arraignment wonld have been implied by that act. As, however, there is no evidence from the record that the defendant pleaded, that he was arraigned, or that he even personally appeared, the judgment in this case must be reversed. There are other essential errors, but the one already examined being sufficient, the others need not be considered.

Judgment reversed.

HARRELL *v.* STRINGFIELD.

Error to Des Moines.

The technical phraseology of a verdict is not material, provided, the intention of the jury is evident beyond all question (*i*).

A judgment will not be disturbed for a substantial defect in a verdict where the record shows that such defect cannot, by any possibility, operate to the prejudice of the plaintiff in error (*j*).

This was an action of replevin, brought by Harrell against Stringfield, upon which the following verdict was rendered: "We, the jurors, find a verdict for the defendant and award him legal damages." Judgment was thereupon rendered against the plaintiff for costs of suit only.

Two errors were assigned; first, that the verdict of the jury does not dispose of the issue; and, secondly, that the

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(*i*) See Gordon & Washburn *v.* Higley, page, *ante*, 13, and cases cited in note (*f*).

(*j*) See Rev. §§ 3111, 2978; Hollenbackc *v.* Haskins, 12 Iowa, 109; Blakely *v.* Bird, *ib.* 601.

verdict is not found in accordance with the statute, which requires the jury, where they find for the defendant, to assess his damages.

For the plaintiff in error, Rorer & Starr.

For the defendant, Browning & Grimes.

By the Court, Mason, Chief Justice. — The errors relied upon for reversing the judgment in this case
*19 are, 1st, That the verdict of the *jury does not dispose of the issue. 2d, that the verdict is not found in accordance with the statute which requires the jury to assess the damages.

The action was originally commenced before a justice of the peace. In his transcript sent up to the District Court on appeal, he states that issue was joined, without declaring what that issue was. Upon that issue the verdict of the jury in the District Court was, "We, the jurors, find a verdict for the defendant and award him legal damages."

This is certainly a very informal verdict. But the case comes nearly within the principle decided at the present term in the case of Gordon & Washburn *v.* Higley, except that the verdict was not rectified in form in the Court below. Whatever might have been the issue, there can be no doubt as to the intention of the jury. It would have been proper for the District Court to have changed the phraseology of the verdict, so as to have given it a correct technical form; but we do not deem it essential.

As to the omission of the jury to assess damages for the defendant in pursuance of the statute, it is a defect which must have operated beneficially to the plaintiff, and, therefore, he will not be allowed to reverse the judgment on that account.

We take this opportunity of recommending to the members of the bar greater care in relation to the entries in the records of the District Courts. While we are determined

not to disturb proceedings in those Courts, for technical errors which can work no possible harm, we shall not hesitate to do so whenever there are plausible grounds for supposing that such errors may create an injury to the party asking a reversal.

The judgment of the Court below is affirmed.

Wm. Rigglesworth *v.* Isaac Reed.

A judgment below will be reversed where the name of the garnishee and the damages and costs are left in blank.

This case was brought up by writ of error for several defects in the record below. Rigglesworth had been proceeded against in the Court below, as a garnishee in a suit wherein Reed was plaintiff, but in the *entry *20 of judgment his name had been left blank. The amount of costs and damages was also left blank.

By the Court, Mason, Chief Justice.—The proceedings in this case have been so irregular, and the record is so imperfect, that the judgment cannot be allowed to stand. The defects pointed out under the fifth and sixth head, in the assignment of errors, are fatal. The name of the garnishee against whom judgment was rendered was left blank in that judgment. The amount of the costs and damages was also left blank. For these and many other errors, we think that the judgment below should be reversed.

Judgment reversed.

Lester Wallis *v.* William Sparks.

Error to Muscatine.

Writ of error will only lie where there has been a final judgment in the Court below.

Where judgment has been arrested, if the plaintiff feels thereby aggrieved, and wishes to test the decision of the Court thereon, he may move for judgment against himself, which will be ordered, as a matter of course, upon which he may bring his writ of error (*k*).

In this case the verdict in the Court below was for the plaintiff, Wallis, who was also the plaintiff below. Judgment, however, was never rendered thereon, having been arrested by the defendant. The plaintiff then brought his writ of error in order to set aside the arrest.

Whicher, for defendant, moved to dismiss the writ, because there was no final judgment in the Court below.

By the Court, Mason, Chief Justice.—The motion in this case must be sustained. Strictly speaking, perhaps the motion should have been to quash the writ of error, but the difference is not very material.

Writs of error will only lie where there has been a final judgment in the Court below. This in general only embraces those decisions and determinations of the Court which would be a bar to another action for the same cause.

The arrest of judgment is in no case such a bar.

*21 *The parties must wait until there is a final judgment of some kind, when the whole proceedings

(*k*) The practice under the Rev. of 1860, now in force, is so entirely different from what it was when this decision was made that this case is of no value in practice in this state.

below may be brought before the Appellate Court by a writ of error.

The plaintiff in this case might have moved for judgment against himself in the District Court which would have been ordered as a matter of course (Fish *v.* Featherwax, 2 Johnson's cases, 215, and Horne *v.* Barney, 19 Johnson's Report, 247), or he might have retraced his steps and accommodated his proceedings to suit the views of the Court until he had obtained final judgment. After which, in either case, if he had felt himself aggrieved, he might have brought the whole matter here for review.

BELL *v.* PIERSON, for the use of Achison.

Error to Des Moines.

By appearance and pleading, the defendant waives all defects in the process, as well as in the service thereof (*l*).

Where the plea was "illegality of contract," setting forth at the same time the facts constituting that alleged illegality, to which there is a general replication, the truth of those facts set forth, is the only question to be prescnted to the jury — not whether those facts rendered the contract illegal (*m*).

The Court cannot regulate its decisions on extrinsic matters. The record is the only guide.

The action was brought on two sealed notes, given by the plaintiff in error to the defendant. The first and sec-

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(*l*) Under the Revision, an appearance *without* pleading, either special or otherwise, to object to the substance or the service of process, is a waiver of any defects in the service, and the defendant is *in court* to all intents and purposes. Rev. § 2840, sub. 3; Hale *v.* Vansaun & Hunt, 18 Iowa, 19; Burns *et al. v.* Keas, *et al.* 20 Iowa, 16.

(*m*) This practice has been changed by statute. See Rev. § 2878; see, also, Beach *v.* Thompson, 15 Iowa, 383; Morgan *v.* Webster Co. *ib.* 595. The issue is not simply whether the facts pleaded are true, but, also, whether they constitute a good defense in law.

ond pleas were, "*non est factum*," and "*fraud.*" For a third plea the defendant alleged that the said writings obligatory were made and executed by said defendant in furtherance of a contract between the said plaintiff and the said defendant for the sale of a parcel of lands belonging to the United States, with the express design that the same should be occupied and held by said defendant, contrary to the statute in such case made and provided. To this there was a general replication, and this constituted the main issue in the case.

Under these circumstances, it appears from the bill of exceptions that the court instructed the jury, that if
*22 the plaintiff, Pierson, had improved *the premises sold, they being public lands as alleged, such sale was legal, and the consideration in such case would be legal and good; to which the defendant excepted.

The first two points in the assignment of errors related to defects in the process and service. The third had reference to the charge of the Court as above stated.

By the Court, Mason, Chief Justice.—The first two points contained in the assignment of errors are readily answered. By appearance and pleading, the defendant waives all defects in the process, as well as in the service thereof. It is not, therefore, necessary for us to consider the sufficiency of such objections under different circumstances.

The consideration of the third point has been attended with greater difficulty. This difficulty has arisen principally from the fact that the record does not present the case which either party has seemed to contemplate. On the one hand, the legality of the sales of public lands is attempted to be proved. This can have no relevancy to the case before us. The parties went to trial in the Court below, upon an entirely different issue. The defendant pleaded "illegality of contract," inasmuch as the notes

were given in furtherance of a sale of public lands belonging to the United States, &c., upon which issue was joined. The only question presented to the jury by this state of pleadings was, whether the notes were given for the consideration stated, and not whether that consideration were legal or not. Had the plaintiffs below wished to present this latter issue, they should, in their replication, have demurred to the plea of the defendant.

But, on the other hand, the counsel for the plaintiff in error seems equally to have overlooked the actual state of the record. His argument seems to suppose that the actual question presented to the jury on the trial in the District Court was, whether the traffic in public lands was or was not illegal. We find nothing in the record to warrant such a conclusion. A distant inference of that kind may be drawn from the charge of the Court; but this inference is not sufficiently irresistible to authorize a conclusion by this Court.

What is there upon the record to show that the verdict of the jury was predicated upon this charge? What evidence do we find there, to prove that this charge was not a mere gratuitous dictum, a random observation, or speculative opinion, wholly irrelevant to the real question then about to be submitted to the jury? If this were the case it would *now be altogether improper to disturb *23 the judgment on account of that charge, even though it were ever so erroneous.

But, from various circumstances, we are led to believe that the real question intended by both parties to be presented to the Court and jury on the trial was, whether or not the sale of public lands was illegal. If this had been the case, the charge of the Court was pertinent to the question. We think also that it was correct.

But we cannot regulate our decisions here upon extrinsic evidence. The record is our only guide. According to that, it would seem that the only inquiry was, whether

the notes were given for the sale of public lands, as set forth in the plea, and denied by the replication. By rendering a verdict for the plaintiffs below, the legitimate inference is, that they found the notes were not given for the alleged consideration. The charge of the Court, therefore, was irrelevant to the question submitted to the jury, and could have had no influence upon the verdict. It would, consequently, furnish no ground for a reversal of the judgment below.

Had the Court below instructed the jury to render a verdict for the plaintiff, in case they found that the plaintiff, Pierson, had improved the premises, &c., or had it, when properly requested, refused to instruct the jury that the circumstance of the land having been improved was wholly irrelevant under the existing state of the pleadings, and that the only question for them to try was as to the truth of the defendant's plea, in either case it would have been error. Nothing of this kind, however, appears upon the record. We are, therefore, of the opinion that the judgment in this case should be affirmed.

Judgment affirmed, accordingly.

CHAPMAN *et al. v.* ALLEN.

The provisions of the statute, rendering it necessary to furnish the defendant with a copy of the summons, was intended for his own benefit, and may be waived by him.

The District Court have a discretionary power to modify or reverse any order during the term at which it was made.

This was an action of trover, brought against three
*24 defendants and *regularly served on two of the number. The third defendant was not furnished with a copy of the summons as required by statute, he, at the time of service, having waived the furnishing of such copy.

After judgment by default, a motion in arrest of judgment was made because a general judgment had been rendered without legal service on one of the defendants. This motion was sustained at first, but, on a subsequent day of the same term, the matter was reconsidered, and the motion in arrest overruled, and final judgment entered.

By the Court, Mason, Chief Justice.— There are two principal questions to be considered in the disposition of this case; 1st, whether the service of the summons was so defective, that to have denied a motion in arrest of judgment would have been erroneous? 2d, whether, after having once sustained such a motion, and arrested the judgment, the District Court, at the same term, can re-consider the matter, reverse the former order, and direct final judgment to be entered. If the course pursued by the District Court, in both these particulars, be correct, the judgment below must be affirmed. The authorities cited by counsel do not bear directly upon either of these points, and our limited means have not supplied us with others more applicable. We shall, therefore, endeavor to apply the general principles of law and reason to the examination before us.

The sufficiency of the service upon two of the defendants, seems to be admitted in the assignment of errors. But it is contended that the service upon the defendant, Delashmutt, was incurably defective. The statute declares, that a summons shall be served by delivering a copy thereof to the defendant, if found, &c., and it is contended that no other mode of service will be sufficient.

The return of the sheriff states, that the summons was served on this defendant by reading, he waiving the right of having a copy. This agreement of waiving the receipt of a copy, say the counsel for the plaintiffs in error, was merely verbal, and such as the Courts do not recognize.

The rule, we think, is stated too broadly. It is true, that

Courts do not, generally, enforce the out-of-door agreements of parties, or their counsel, which are not reduced to writing, but the case before us seems to belong to a different class. The sheriff is an officer of the Court, and his returns, in writing, frequently furnish the sole basis for further judicial proceedings. If he makes a false return, he is liable to an action. Had the return on the summons, in
*25 the present case, been *"served," the requisition of the statute would have been complied with, and the propriety of the proceedings unquestioned. Did he intend to make a false return, he would doubtless adopt the latter method.

It seems to us, therefore, that there is no impropriety in our receiving and acting upon the return of the sheriff in this case, as the truth. The provision of the statute rendering it necessary to furnish the defendant with a copy of the summons, was doubtless intended for his own benefit. When the Court is satisfied, by legitimate evidence, that he has waived this right, will it allow him to lie still during all the preliminary stages of the cause, and then afterwards come in to arrest the judgment, and overturn all the proceedings? To establish such a rule would, we think, be countenancing bad faith, and subverting the ends of justice. We are, therefore, of the opinion that judgment in the Court below ought not to have been arrested for defective service.

With regard to the second question above proposed, it appears from the record, thatjudgment in the Court below was at first arrested; and that subsequently, that order was reversed and judgment entered. It does not appear, as the counsel for the plaintiffs in error seem to suppose, that after the arrest of judgment a second default was entered, upon which judgment was finally rendered. For some cause, the order of Court arresting the judgment seems to have been rescinded, which left the proceedings precisely where they were previous to the judgment being arrested.

At that point they were taken up and judgment rendered upon the verdict of the jury. We see no impropriety in all this. It seems highly expedient that the District Courts should have a discretionary power to modify or reverse any order of this nature during the term at which it was made. Such a power, in most cases, will tend to the more speedy administration of justice, by enabling that Court frequently to correct some manifest error which had perhaps temporarily escaped detection.

As to the objection that time should have been given to the defendants to come in and plead after the arrest of judgment, it is answered by the fact that we cannot regard the judgment as ever having been arrested, the order therefor having been reversed in the Court below. We are therefore of the opinion that the judgment in this case should be affirmed.

Judgment affirmed, accordingly.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF IOWA.

JULY TERM, 1840.

HON. CHARLES MASON, CHIEF JUSTICE.
" JOSEPH WILLIAMS, } ASSOCIATE JUDGES.
" THOMAS S. WILSON, }

C. A. BALLARD *v.* RIDGLEY & BILLON.

Error to Louisa.

Where a rule of decision relative to the remedy is changed by statute, the new rule will be applicable to all cases subsequently tried, although they might have been commenced prior to the enactment of the statute.

The statute of this territory, despensing with the necessity of proving the names of the individuals composing a firm, took effect in cases previously commenced, if tried afterwards.

The declaration in this case was upon a promissory note. It set forth that Charles Ridgley & Henry Billon, trading and doing business under the name, style, and description of Ridgley & Billon, complains, &c. Subsequently to the filing of the declaration, but before the trial of the case it was enacted, by a statute of the territory, "that in all suits *brought in any Court of the territory *28 upon any promissory note, bond, bill, or other instru-

ment of writing, made payable to, or by any corporate body, by their corporate name, or any association of individuals, by their associate name, or partners trading together, under their partnership name and style, it shall only be necessary to prove the corporate, associate, or partnership name and style, without proving the name of the individuals who compose the same," &c. On the trial, the partnership name and style of the firm was proved, but not the names of the individuals composing the same. Judgment was rendered for the plaintiff below, and thereupon a bill of exceptions was tendered and the case brought to this Court.

The case was submitted to the Supreme Court without argument.

PER CURIAM, MASON, CHIEF JUSTICE. — This cause was submitted without argument, and even without stating the points relied upon, further than they are contained in the bill of exceptions. The action below, however, it appears, was upon a promissory note given by the plaintiff in error to the firm of Ridgley & Billon, by their partnership name. On the trial, the existence of the firm was proved, but not the individual names of the partners composing it. The Court decided this to be sufficient, and this decision was undoubtedly correct, being in direct accordance with the statute of this territory in relation to promissory notes, &c., approved, January 4, 1839. It is true, this suit was commenced previous to the passage of that act, but the trial took place afterwards, and the rules of decision in all the subsequent proceedings, so far as they relate merely to the remedy, must by regulated by that statute. The judgment below is, therefore, affirmed.

ABEL INGHRAM *v.* DOOLEY *et al.*

Error to Van Buren.

Where a statute changes the practice, all subsequent proceedings in cases then pending must be in accordance with such statute (*n*).

The act of this territory dispensing with the necessity of proving the signature of notes, bonds, &c., unless such signature had previously been denied under oath, operates upon cases previously commenced, and even upou those where the issue had been previously joined.

*29 *This action was brought upon a sealed note given by defendants to the plaintiff. After the suit was commenced, and before the trial, an act of the legislature prohibited any defendant from denying, on trial, the execution of any instrument on which the action was brought, unless he had previously filed his affidavit, denying the same. Laws of Iowa, 383. No such denial under oath had been made, and on the trial the defendants objected to the reception of the notes in evidence until the signatures were proved, upon the ground that the issue having been joined previous to the passage of the act referred to, the proceedings on the trial should not in this respect be governed by that statute. The Court sustained this objection, and thereupon a bill of exceptions was tendered.

Upon examining the record, however, it appears that the issue was not joined until after the passage of the statute above referred to, but from the following decision it appears that this circumstance was wholly immaterial.

J. D. LEARNED, counsel for plaintiff, contended that the statute referred to applied exclusively to the manner of enforcing the remedy, and did not in the least affect the con-

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(*n*) See Phares *v.* Walters, 6 Iowa, 106; Montgomery *v.* Chadwick, 7 Iowa, 114; Byington *v.* Ryder, 9 Iowa, 566, sec. 1. See also Rev. §§ 29, 4172, 4173, 4174.

tract or the rights of parties under it, and therefore was to regulate the practice in this particular in all trials subsequent to its enactment.

Rorer, for defendants, insisted that the change in the practice could not affect cases then pending, and in support of that position cited Miller *et al. v.* Dennett, 6 N. Hamp. Rep. 109; The Society *v.* Wheeler, 2 Gallison Rep. 139; Calder *v.* Bull, 3 Dallas Rep. 388; Waggart *v.* Winnich, 3 N. Hamp. Rep. 437; Dow *v.* Norris, 4 *ib.* 19; Battelle *v.* King, 12 Mass. Rep. 537.

Per Curiam, Wilson, Justice. — The decision of the Court below was given upon a mistaken state of facts. The first objection is, that the Court refused to admit the writing obligatory upon which the suit was brought, to be read in evidence to the jury, under the provisions of the statute of Iowa, approved January 4th, 1839, because the issue upon the pleadings filed in said cause had been made up previous to the passage of the said act, but required proof of the signature of the said writing obligatory. We find from an examination of the record in the case that the defendant's plea was not pleaded, nor was issue joined until April term, 1839. The statute referred to, authorizing the
*30 consideration *of all bills; promissory notes, bonds, &c., as *prima facie* evidence of their execution, and requiring the party denying the same to make such denial under oath, took effect on the first of March, 1839 — previous to the issue being joined. This statute being in force, the plaintiff was entitled to the benefit of it, and the Court below erred in requiring the signature of the note to be proved.

But to take the facts as presented by the bill of exceptions, we see nothing to distinguish the principle which would then be involved, from that which controlled the decision in the case of Ballard *v.* Ridgley & Billon, decided

at the present term of this Court. The statute alluded to merely lays down a rule of evidence, and relates solely to the remedy, and, therefore, if the suit were commenced and the issue joined previous to the enactment of this statute, still. the proceedings at the trial should have been governed by that statute, which had then taken effect. The statute changes only the practice.

Judgment below reversed, and cause remanded to Court below for further proceedings not inconsistent with this decision.

JAMES FIKE *v.* THE UNITED STATES.

Error to Lee.

The statute of this territory for preventing writs of error from being brought after the expiration of a year from the rendition of judgment, applies to criminal, as well as civil, cases.

This was a motion to dismiss the writ of error, because it was not sued out until after the expiration of a year from the rendition of judgment and sentence of the plaintiff in error under a criminal prosecution.

PER CURIAM, MASON, CHIEF JUSTICE. — A motion is made to dismiss the writ of error in this case, because it was not sued out within a year from the rendition of the judgment below. The counsel for the plaintiff in error admits that if the act of the last session of the legislature, limiting the time for bringing writs of error, was intended to apply to criminal cases, the motion to dismiss must prevail. The only *enquiry, therefore, is to ascertain whether *31 this statute was intended to be limited in its application to proceedings in civil cases.

The act regulating proceedings in criminal cases, commencing at section 76, provides for bringing writs of error in criminal cases, but fixes no limitation as to the time within which they may be brought. We are not aware that any antecedent statute had prescribed such limitation. No slight inconvenience would result to the public from allowing judgments of this kind to be disturbed after the lapse of an indefinite period from the time of their rendition.

The act of the last session, to which allusion is made above, appears from its title to be amendatory to an act regulating practice in the District Courts. Still, its provisions, to a very great extent, relate to proceedings in the Supreme Court. The legislature did not use that precision which is sometimes observed in preserving a correspondence between the title and the substance of the act. The statute to which it is an amendment, related to proceedings in civil cases. Still, there is in the amendatory act, a declaration fixing a limitation so broad as apparently to embrace criminal, as well as civil, cases. It is possibly only another example of the inadvertence of the legislature, but to which, nevertheless, we feel bound to give full force and effect, as we cannot found our decisions on mere possibilities. We shall, therefore, sustain the motion to dismiss the writ of error.

UNITED STATES, *ex rel.* DAVENPORT AND OTHERS *v.* THE COMMISSIONERS OF DUBUQUE COUNTY.

The law authorizing the establishment of the seat of justice of Scott county, by a vote of its inhabitants, directing the returns of the election, together with the ballots and poll list, to be made to the sheriff of Dubuque county, who, in company with the county commissioners, was to examine said returns, and on being satisfied which place had

the majority of votes, a minute thereof was to be made in the proceedings of the said board of commissioners, &c.: held that the sheriff was the only party to be "satisfied" in relation to such majority, the county commissioners being mere witnesses of the correctness of his proceedings.

Neither the county commissioners nor the sheriff had, in that case, a right to purge the polls, the law requiring him merely to be "satisfied" as to the number of votes, and not as to their genuineness

*The writ of *mandamus* generally issues to a public functionary, *32 to perform some specific duty, and will never be granted where there is any other adequate remedy.

Appeals do not lie from the board of county commissioners to the District Court, on account of their omitting to discharge some specific duty involving no discretion.

Neither will they lie from any decision not embraced in the scope of their legitimate duties as county commissioners.

For either of these reasons an appeal would not lie in the present instance, on account of the county commissioners neglecting to make the entry in their proceedings, required by law.

The writ of *quo warranto* would not have lain in this case, there being no office or franchise in controversy.

Where a discretionary duty is imposed on an inferior tribunal, a writ of *mandamus* will issue, to compel that tribunal to act in the premises, but not to direct in what manner it shall act.

In the present case, the duty of the county commissioners was not discretionary, but specific, and the writ of *mandamus* was the proper means of compelling its performance.

The act required of the commissioners was to be performed, not in their private capacity, but as a board, and, therefore, their successors may be required to perform the act incumbent on *them*.

The Court of highest original jurisdiction is the proper tribunal to issue a *mandamus*.

The Supreme Court of this territory, although an Appellate Court, is still authorized by statute to issue writs of *mandamus*, when such an act is necessary to enforce the administration of right and justice throughout the territory, but in order to justitify such an act, it must appear to be strictly *necessary*.

A resort to the Supreme Court in the present case was not "necessary" within the meaning of the statute, and, therefore, the proper District Court was the proper tribunal to which application should have been made for the writ of *mandamus*.

At the last term of this Court an alternative *mandamus* was granted n this case, and a motion was now made to

render the same perpetual. The history of the case, and the arguments for and against the motion, are sufficiently set forth in the opinion of the Court.

For the relators, GRANT & LEARNED.

MITCHELL & THOMPSON, counsel for respondents.

PER CURIAM, MASON, CHIEF JUSTICE.— The delicacy and importance of this subject justify us in having devoted so much time to its discussion, and call for much circumspection in this Court in making its decision. We have given
*33 to the very elaborate and able arguments that *have been addressed to us our careful consideration, and shall now proceed to state the conclusions to which we have been led.

In 1838, the legislature of the territory of Wisconsin authorized an election to be held in the county of Scott; for the purpose of determining which of the two rival towns, Rockingham and Davenport, should thenceforward be the seat of justice of that county. Returns of said election, together with the ballots and poll list were to be made to the sheriff of Dubuque county, who, in company with the county commissioners, or two of them, was to proceed to examine said returns, and on being satisfied that either of the places named had a greater number of votes than the other, the town having the greatest number of votes was thenceforward to be the seat of justice of Scott county, and a minute thereof was directed to be made in the proceedings of the said board of commissioners of Dubuque county.

It appears that the election was held, the returns made, and that upon counting the votes there were fourteen more for Rockingham than for Davenport. The board of commissioners, however, without the concurrence of the sheriff, as it would seem, went into an enquiry as to the legality of

some of the votes polled, and became satisfied that eighteen illegal votes had been cast for Rockingham, leaving a majority of four votes in favor of Davenport, and they certified accordingly.

Previous to the session of this court, in July, 1839, notice was served on the county commissioners of Dubuque county, that at the said session of the Court, a motion would be made directing them to amend and correct their entry aforesaid. At that session, upon sufficient reason therefor being shown, an alternative *mandumus* was ordered, and a motion is now made for a peremptory *mandamus*.

The first thing into which we propose to inquire is the legality of the proceedings of the Dubuque commissioners. Were they authorized to look behind the returns and examine into the legality of the votes polled? It is contended that they are to be "satisfied" that one of the places has a greater number of votes than the other, that the word "vote" means "lawful vote," and that, therefore, an examination into the legality of such vote was indispensable.

But were the county commissioners to be "satisfied" in the case? The law declares that the returns shall be made to the sheriff, who shall, in company with the county commissioners, proceed to examine said returns, and on being satisfied, &c. The grammatical construction of this language clearly points to the sheriff as the person to be "satisfied," *that he was to count the votes, the *34 commissioners being merely present as witnesses, and in order to record the result.

But even supposing the opposite construction to be correct, of what were they to have been "satisfied"? Not of the legality of the votes, but only of their number on each side. If it had been intended that they should have purged the polls, some direct authority would have been given for that purpose. Some mode of trial would have been prescribed, some means of taking testimony provided,

and other measures taken to give both parties an equal opportunity for contesting antagonist votes, and for securing a fair and open investigation. Nothing of all this was done. We are, therefore, clearly of the opinion that the inspectors of election were the only tribunal authorized by law to determine the qualification of the voters; that the sheriff of Dubuque county was to satisfy himself which place had the greatest number of votes, and that the commissioners of Dubuque county were to make a minute thereof in their records, and that was all their duty.

Our next inquiry will be, whether the writ of *mandamus* was the proper remedy for the relators. This writ generally issues to compel a public functionary to perform some specific duty. It will never be granted where there is any other adequate remedy as is usually the case in all transactions betwen private individuals.

It is contended on the part of the respondents that if the commissioners had erred, the proper remedy was an appeal to the District Court. We think otherwise. The appeals thus authorized, must doubtless be understood to refer exclusively to acts performed in the discharge of their ordinary duties, and such as imply the exercise of some discretion on their part. If, for example, the law had imposed on these commissioners the duty of fixing the seat of justice of Scott county themselves, this being no part of their duty as county officers, there would have been no appeal. Again, the law renders it incumbent on them to hold a session at certain fixed periods. Should they neglect to do so, no appeal would lie, for the act to be performed is specific.

In the case we are now considering, not only was an extraordinary duty imyosed upon them, but that duty consisted in the performance of a specific act which left them no discretion. It was not a "decision" within the meaning of the statute. We are therefore clearly of the opinion that no appeal lay therefrom to the District Corut.

It is further contended that the writ of *quo warranto* is the proper remedy, but the authorities cited do not sustain the position. They refer to cases where one person claimed an office which was held by *another under *35 color of right. Our own statute provides that where any person or persons shall usurp, intrude into, or unlawfully hold or exercise any public civil office, or any franchise within this territory, or any office in any corporation created by the authority of this territory, or when any public civil officer shall have done or suffered any act which, by the provisions of law, shall work a forfeiture of his office, or when any association of persons shall act as a corporation within this territory, without being lawfully incorporated, the district attorney of the proper county shall, when directed, &c., file an information in the nature of a *quo warranto* in the District Court. Iowa Laws, page 390. Under that statute it cannot be contended that the writ of *quo warranto* could issue, unless this is an "office" or a franchise. We think it neither. If it be either, in whose hands is it? True, the people of the town of Davenport might be benefitted by having the seat of justice located there, but they might be equally so by the erection of public buildings, the termination of a railroad, the creation of of a water power, and the like. In all these cases the benefit is only incidental. They have a collateral interest, but not a vested right, which will be recognized by the laws, and which is essential to the constitution of an office or franchise.

But is insisted that a *mandamus* should not be granted in this case, because the commissioners have already acted on the subject, and authorities have been adduced to show that it will only issue to compel action, not to direct what that action shall be. This position is doubtless correct, where the act sought to be enforced is one resting in the discretion of an inferior tribunal or other public functionary. But where the law enjoins the performance of a spe-

cific act, obedience to that law may, in the absence of other remedies, be enforced by writ of *mandamus*. Such is the case in the present instance.

The general purpose of this writ is to prevent disorder from a failure of justice or defect of police, rather than to afford a private remedy. In this case the public have an interest in the establishment of the county seat of Scott county, and that interest cannot be adequately secured in any other manner. The entry in the proceedings of the board of commissioners of Dubuque county, was to be the only record of the fact of either town being the seat of justice. Not to have that entry made, therefore, would be a "failure of justice," and might occasion a great "defect of police," from which disorder might very probably arise. The aid of this writ was, therefore, very properly invoked.

But it is said the county commissioners have been changed since the entry should have been made. No
*36 difficulty can arise from that source. *They were required to act in their official, not in their private, capacity. It was the county commissioners of Dubuque county, not the particular individuals composing that board, who were to make the entry in their proceedings. That same board still exists, and is fully competent to perform the prescribed duty.

It only remains to enquire whether application for the writ of *mandamus* was properly made to this Court. The case of Marbury *v.* Madison, 1 Cranch, 137, settled the principle that Courts of merely appellate jurisdiction could not issue this writ except in aid of their appellate powers. It matters not from whence a Court receives its authority, whether from a constitutional provision or from a legislative enactment. If limited entirely to an appellate jurisdiction, it would have no power to issue this writ as an original proceeding. It is therefore necessary for us to enquire into the character of the constitution of this Court. The organic act of this territory, after providing

for a Supreme, District, and other Courts, declares that their jurisdiction shall be as limited by law. The same act, § 12, provides that the then existing laws of the territory of Wisconsin shall be extended over this territory, so far as the same are not incompatible with the said organic act.

The only statute which we find defining the jurisdiction and powers of this Court, is contained in the acts of 1836, page 23. The first section of that act declares, "that the Supreme Court of the territory shall have and exercise an appellate jurisdiction only, &c." Had this been the only provision in relation to the subject, there would have been no difficulty in disposing of the present question. But the second section of the same act provides "that the Supreme Court shall have power to issue writs of *habeas corpus*, *mandamus*, *quo warranto*, *prohibition*, *error*, *supersedeas*, *procedendo*, *certiorari*, *scire facias*, and all other writs and process not specially provided for by statute, which may be necessary to enforce the administration of right and justice throughout the territory."

On the one side it is contended that this section modifies that which precedes it so far as to authorize any of the writs therein named to be issued in almost all cases for the promotion of justice and the establishment of right throughout the territory. On the other hand, it is insisted that these writs are only authorized so far as the same are necessary to carry out the appellate powers of this Court, that the provisions of the two sections should be construed as that they might exist together, and that it was not to be presumed the legislature would make so positive and explicit a declaration on a point of such im- *37 portance, which they intended to modify so materially in the very same act.

We do not concur entirely in either of these constructions of this law. If practicable the two sections must receive such an interpretation that they may both exist to-

gether. But if they are wholly irreconcilable, the latter becomes paramount. The second section above referred to, after enumerating the writ of *mandamus* and several others (some of which could hardly become auxiliary to the exercise of appellate power), authorizes the issuing of all writs and process which may be necessary to enforce the due administration of right and justice throughout the territory. The fact that the writ of *quo warranto* is mentioned (and perhaps some others), which could only be used in the exercise of original power, negatives the idea that these writs are only to serve as auxiliaries in the exercise of appellate jurisdiction.

Still, although the two sections cannot be wholly reconciled, it is the duty of this Court to give them such a construction as shall render the discrepancy as small as possible. This will be done by limiting the issuing of the writs mentioned in the second section to cases in which they may be "necessary" to enforce the due administration of right and justice throughout the territory. They are not to be granted in all cases whenever required for these purposes, but only when their interposition becomes "*necessary*." If, therefore, contrary to the declaration contained in the first section of the statute, we are to venture upon the exercise of original judicial power, the occasions on which it should be exerted, should be as few as possible.

We are confirmed in this view of the case by the consideration that if the writs and process authorized by the second section of the statute are to be issued from this Court in ordinary cases whenever their interposition may be found beneficial, the business of the Court may become very much augmented, to the great inconvenience and delay of suitors, and to the detriment of the public interest. Cases of the most trivial nature may be brought from the extreme portions of the territory, with perhaps little other object than to harrass and oppress, or to indulge some petty

feeling of malice. We have, therefore, no hesitation in coming to the conclusion that resort in such cases can only be had to this Court, where, for the due administration of right and justice, such resort becomes "*necessary*."

Is that the case in the present instance? We have already come to the conclusion that "to enforce the due administration of right and justice" in the present instance the writ of *mandamus* was the only effectual *process. In other words it is "necessary" within *38 the meaning of the statute. It only remains to enquire whether it would not more properly be issued by another tribunal. If the proper District Court has jurisdiction of cases of this kind, recourse to the Supreme Court can certainly not be "necessary." It would doubtless be much more convenient and proper to apply to the District Court in the first instance.

From an examination of the various statutes in force in this territory, it appears to be the evident intention of the legislature to vest the District Courts, to the fullest extent, with general original jurisdiction in matters civil as well as criminal, and both at law and in equity. It appears to be the policy of the law to permit suitors a resort to these more convenient tribunals with the right of appeal to the Supreme Court. The seventh section of the laws of Wisconsin, above alluded to (Laws of 1836, page 24), gives the District Courts in term time, and the Judges thereof in vacation, power to award throughout the territory, returnable in the proper county, writs of injunction, *ne exeat*, *habeas corpus*, and all other writs and process that may be necessary to the due execution of the powers with which they are vested. Writs of *mandamus* in all ordinary cases must certainly be included in this number. It may in some instances become necessary to issue a writ of *quo warranto*, or *mandamus*, to the Judge of one of the District Courts. It would probably then become "necessary" that the writ should issue from this Court, and the law in that case gives

us jurisdiction. But in all ordinary cases we deem it much more expedient and proper, more convenient to the parties concerned, and more beneficial to the public in every respect, that application for purposes of this nature should be made to the District Court of the proper county, and such we believe to be the law of this territory.

The Supreme Court of the United States in the case of Kendall *v.* the United States (12 Peters 524) furnish high authority for many of the views herein contained, and especially in relation to the District Court being the proper tribunal for issuing the writ of *mandamus*. One of the Judges, in delivering his opinion in that case, after stating that this was a high prerogative writ, which in England only issued from the King's bench, where the King formerly sat in person, and that it was confined to cases of a public nature, says: "Upon the same principal, I believe it may be affirmed without exception, unless where a statutory provision has been made, that in every state of the Union, where the common law prevails, this writ issues only from the Court possessing the highest original common law jurisdiction." The District Court of this
*39 territory *possesses that jurisdiction, so that in the absence of all statutory authority, writs of *mandamus*, should, in accordance with the practice of the states of the Union, issue from that Court.

The exercise of that power, therefore, by the Supreme Court being unnecessary in ordinary cases, for the reason that the District Courts are fully competent for that purpose, we are clearly of the opinion that we have no jurisdiction over the matter, and the motion for a peremptory *mandamus* will of course be denied.

We might have avoided deciding more than this last point, but inasmuch as the whole case has been argued at length, and as it will tend to abridge future litigation on the subject, we deemed it proper to express our views on the entire subject.

Harlan & Duncan *v.* Sigler.

Error to Van Buren.

Where a note is not negotiable at the time of its execution, it is competent for the legislature, by a subsequent act, to authorize the assignee to sue in his own name.

A statute may be operative in part, and inoperative in other respects (*o*).

This case was submitted without argument. The facts can be sufficiently gathered from the opinion of the Court.

Per Curiam, Mason, Chief Justice.— From the transcript of the record in this case, it appears that the defendants below executed their sealed note or single bill to one David Hanes, who endorsed the same over to the defendant in error. At the time of the execution and assignment of the note it was not negotiable; but afterwards (and prior to the commencement of this suit) a statute was passed, rendering such notes assignable, and authorizing the assignee to sue in his own name. Suit was instituted in that manner accordingly, and a judgment recovered in the District Court, to reverse which the case has been brought here by writ of error.

Two causes of error are assigned: the first, that the petition (by which the suit was commenced) does not show cause of action *in favor of the plaintiff, as to *40 entitle him to recover. In examining the petition, we find it to correspond with the form prescribed in the

(*o*) This principal is recognized in the following cases: Santo *v.* The State, 2 Iowa, 165; The District, &c. *v.* The City of Dubuque, 7 Iowa, 262; High School, &c. *v.* Clayton Co. 9 Iowa, 175; Louisa Co. *v.* Davidson, 8 Iowa, 517; Childs *v.* Shower, 18 Iowa, 261; The city of Des Moines *v.* Layman, 21 Iowa, 153; Walters *v.* The Steamboat Mollie Dozier, 24 Iowa, 192.

statute; the only observable defect being in the statement of the names of the defendants. They are described as A. W. Harlan and Wm. Duncan, *alias* Aaron W. Harlan and William Duncan. This is not the proper manner of identifying the entire with the abbreviated name. Still, as the intention is evident, no objection can be sustained in the present stage of the proceedings.

It is probable, however, that the error intended in the first assignment, is substantially the same as that embraced in the second, which is, that the note was not assignable in such a manner as to vest in the assignee the power to sue in his own name. The law passed subsequently to the assignment could not invade the rights of either party, as they then existed, although it might modify the remedy by which those rights were to be enforced or protected. Had the present law been in force prior to the assignment of the note, there could have been no question as to the regularity of the present proceedings. It only remains to enquire, whether the statute would so far operate upon the case as to justify the institution of the suit in this form.

Under the law as it existed at the time the note was assigned, the assignee might have brought suit in the name of Hanes, for his own use. In such a case the defendants below might have availed themselves, to a certain extent, of the equities existing between themselves and Hanes. Under the new law, their rights in this respect would have been very different. That feature of the law, therefore, cannot be allowed to operate in this case, since it would impair the obligations of a pre-existing contract.

But so far as the new law authorizes the assignee to bring suit in his own name, we see no objections to giving it effect. It applies solely to the remedy. It merely declares that Sigler's name may stand alone as plaintiff, instead of the suit commencing in the name of "Hanes for the use of Sigler," —the equities remaining as before. It is a mere matter of form, and leaves the substantial rights of the

parties wholly untouched. We think there was no error in the District Court, and the judgment will accordingly be affirmed.

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*Creighton *v.* Gordon. *41

Error to Louisa.

Notes made payable to bearer are transferable by mere delivery, and where the declaration set out that such note was "duly assigned and delivered," it was held to be no variance that the note was not *endorsed* (*p*).

Where an assignment was valid at the time it was made, the transaction will not be affected by a subsequent statute, prescribing a different mode of assignment, although such statute was passed prior to the institution of the suit.

The legislature may prescribe the form of instituting suits, and may direct the act to take effect in relation to notes previously executed, provided suits thereon be subsequently instituted.

Notes made payable to "bearer" are negotiable, independent of statute.

The act of 1839, in relation to promissory notes, is an enlarging statute, merely rendering those notes, bonds, &c., negotiable, which before were not so.

This action was brought upon a note made payable to John Millard, or bearer, dated December 29, 1837, at which time the law of Michigan, in relation to promissory notes, and which is similar to the English statute, was in force here. In 1839, a law was passed by the legislature of Iowa, declaring that all promissory notes, bonds, &c.,

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(*p*) Story on Promissory Notes,, § 116; Baly on Bills, ch. 5, § 1 (fifth edition). In reference to the transfer of notes and bills by *indorsement* and by *assignment*. See Younker *v.* Martin, 18 Iowa, 143; Harrison *v.* Mc Kim, *ib.* 485; Franklin *v.* Toogood, *ib.* 515; and authorities cited in those cases.

made payable to any person, &c., should be assignable *by an endorsement thereon.* The declaration set forth, that the note was "duly assigned and delivered," but the note offered in evidence had no endorsement upon it.

The assignment of errors set forth,

1. That the declaration sets out the said note to be *assigned and delivered*, whereas there was no assignment on the note produced and read in evidence.

2. The suit is instituted in the name of James Gordon, as assignee, whereas he does not appear to have any legal title or right to said note.

3. Said note is not assigned to said Gordon, nor was any evidence introduced to show any right he had as the assignee or holder of said note.

4. Because there is a variance between the note and the description thereof in the declaration.

For the plaintiff in error, GRIMES & BROWNING.

For the defendant, ROBER & STARR.

*42 *BY THE COURT, MASON, CHIEF JUSTICE. — This action was brought upon the following instrument: "Due John Millard or bearer, one hundred dollars, the 1st day of June next, for value received. Louisa county, W. T. Dec. 29, 1837," and signed by the plaintiff in error. It was never endorsed, but came by delivery into the possession of Gordon, who brought suit on the same in the District Court, and obtained a judgment, which there is now an effort to reverse.

The declaration sets out that the note was "*duly assigned and delivered*" to the plaintiff below, and the counsel for the plaintiff in error insist, that a *written* assignment or endorsement was thereby meant, and that, consequently, there is a variance between the note and the description in the declaration. We think this position is untenable. Notes made payable to *bearer* are transferable by

mere delivery, and vest in the holder the right to bring suit in his own name. Such a transfer is a parol assignment. The holder divests himself of the property in the note, and transfers it all to the assignee. Possession is *prima facie* evidence of property. Gordon, therefore, being the holder of the note, it was to be presumed he was the owner thereof; and that it had been duly transferred to him. Had the declaration set forth the note as having been *endorsed*, an endorsement in writing must have been shown; but, although *endorsement* is a species of *assignment*, the latter is much more comprehensive than the former, and in instruments of this kind may be duly made by parol.

But it is contended that, as this action was commenced since the new statute took effect, it must be controlled by that statute. In some respects, this would certainly be the case. But the assignment or transfer must be presumed to have taken place before this act went into operation, and if made in accordance with the law, as it then existed, might certainly have been properly described as having been "*duly assigned over and delivered.*"

Agreeably to the decision of Harlan & Duncan *v.* Sigler, made at this term of the Court, the legislature was competent to have passed an act that should so far operate upon a pre-existing note, as to prescribe the form and manner in which the suit thereon should be instituted, and to render it necessary for Gordon to have sued in the name of Millard. But did they exercise their power in this particular?

It may very plausibly be questioned, whether the act of the Iowa legislature, in relation to promissory notes, is intended to apply at all to negotiable paper, inasmuch as no mention is therein made of notes made payable to "*order*," or to "*bearer.*" It speaks of notes payable to *43 *any person," &c., and declares them assignable by endorsement; and it may with much propriety be argued,

that this branch of the statute in particular was only intended to extend the law in relation to negotiable paper, so that it should embrace other instruments not before negotiable. If this position be correct, the objection we have been considering vanishes at once, for in that case the former law on the subject remains unrepealed.

But whether the act of Michigan on this subject be still in force or not, can, we think, make no difference in the decision of this case. We hold that, in the absence of all legislation, notes of this kind would be transferable by delivery, giving the holder the right to sue in his own name, inasmuch as he is possessed of the legal interest. This right is in strict accordance with the precise terms of the instrument itself, and no principle of law recognized at the present day prevents the carrying this agreement strictly into effect. Formerly, there was a great aversion to the assignability of a *chose in action*, but experience has so conclusively demonstrated the utility of deviating from the strict rules established on this subject, that even where the legislature has not interfered, the decisions of a former period have, to a very considerable extent, been overturned or evaded. At the present day no statute would be necessary to render a note negotiable which the maker himself had expressly declared should be payable to *order* or to *bearer*. To change this state of things, an express legal enactment is necessary.

The Iowa statute makes no such provision. It is an enlarging, not a restraining, statute. It renders a note negotiable where no such agreement was made by the parties thereto, and even where there might have been an expressly contrary intention and understanding, but it does not limit the rights which assignees possessed, independent of that statute.

The judgment below will, therefore, be affirmed.

Gabriel Long, for the use of Walling, *v.* Jesse Long.

Gabriel Long, for the use of Walling, *v.* Jesse Long.

Error to Muscatine.

Where suit is brought in the name of the payee, for the use of the endorsee of a promissory note, the maker may set up want of consideration (*q*).

*Although the words, "witness my hand and seal," are contained in the body of an instrument, this does not render it a specialty, unless there be a seal or scrawl actually attached thereto. *44

This was an action of debt, brought upon the following instrument:

"On or before the first day of February next, I promise to pay Gabriel Long, the value and full sum of two hundred dollars, for value received of him, as witness my hand and seal this 2d day of February, A. D. 1838.

(Signed) "WM. LONG."

On which were the following endorsements:

"For value received, I assign the within to Jerome B. Walling, this 12th Dec. 1838.

(Signed) "GABRIEL LONG."

"For value received, I assign the within to Jesse D. Walling. February 5, 1839.

(Signed) "JEROME B. WALLING."

To this there was a plea of *nil debet*, on which a judgment was rendered for the plaintiff. The other material facts may be gathered from the opinion of the Court.

By the Court, Mason, Chief Justice.—The note on which this suit was brought was given by William Long

(*q*) Yonker for use, &c. *v.* Martin, 18 Iowa, 143; Temple *v.* Hays & Hendershott, *ante*, 9; Sater & Wade *v.* Hendershott, *post* 118. Under the Revision (§§ 2757, 2758), the legal or equitable owner of a chose in action may sue in his *own name*, without the words "for the use of another." Cottle *v.* Cole & Cole, 20 Iowa, on p. 486; Rice *v.* Savery, 22 Iowa, 470.

to Gabriel Long, and afterwards came by two endorsements into the possession of Walling. The first of these endorsements was made before the note became due, the other afterwards. The body of the note contained the words, "witness my hand and seal," but no seal or scrawl was affixed to the name of William Long. The suit was brought in the name of Gabriel Long for the use of Walling.

The bill of exceptions states, among other things, that on the trial of the cause, the defendant below offered to prove that the note was given without consideration, which was objected to, and the objection sustained by the Court. This appears to be substantially the same error for which the judgment in the case of Temple *v.* Hays & Hendershott, was reversed at the last term of this Court, and we see nothing to create a distinction between the two cases.

It is objected, that in this case, the defendant below neither pleaded nor gave notice of a want of consideration; but was that necessary? In assumpsit, want of consideration may be given in evidence under the general issue. 1 Chitty's Plead. 511. And it seems that nearly the same matters may be given under the plea of *nil debet* in actions of debt. 1 Chitty, 517, note p. We are inclined to think that no notice or plea of want of consideration was necessary to enable the defendant to give evidence of that fact in his defence.

*45 *But it is contended for the defendant in error, that the instrument declared on was a speciality, to which want of consideration would be no defence. It has sometimes been decided that the existence of the seal or scrawl was not sufficient to constitute a speciality, unless the same were referred to in the body of the instrument, but we are not aware that the allusion to the seal in the instrument, as in this case, is of itself sufficient to constitute a speciality, in the absence of both the scrawl and the seal. We think such, certainly, would not be the case.

We will merely observe in conclusion, that in one respect this is a stronger case for the plaintiff in error than that of Temple *v.* Hays & Hendershott, above quoted. There the instrument declared on was negotiable. Had the holder of the note in that case availed himself of the right of suing in his own name, fraud or want of consideration in the origin of the note, would have been no defence. But in the present instance, the note was not negotiable, but is to be governed by the rules applicable to ordinary choses in action. In all such cases, want of consideration between the original parties, is a good defence to a suit brought for the use of the assignee. Chitty on Bills, 9. The judgment below is therefore set aside, and a new trial granted.

George W. Hight *v.* Jacob White.

Error to Des Moines.

In debt on judgment, where the declaration described the judgment to be for $834,41 damages and costs, and the record produced in evidence showed a judgment for $834,41 damages besides costs, held to be a fatal variance.

Although the variance may be such as would, in this particular instance, operate beneficially to the plaintiff in error, this will not cure the defect (*r*).

Debt on judgment. Plea *nul tiel record*, and judgment for the plaintiff below. The facts are sufficiently set forth in the opinion of the Court.

(*r*) Under the Revision of 1860 (§ 2608), all the old common law forms of actions are abolished.

Rorer & Starr, for plaintiff in error, cited Wolf *v.* Roundsford, Ohio Cond. Rep. 841; 1 Chitty's Pl. 304; 1 Term Rep., 240; Snell, Stagg & Co. *v.* Moses & Sons, 1 Johns Rep. 96 to 105; Cook *v.* *Graham, 3 Cranch, *46 229; 1 Cond. 508; Smith *v.* Barber, 3 Day, 312; 4 Wash. C. C. Rep 97; 2 Wash. C. C. Rep. 482 and 422; Thompson *v.* Jamison, 1 Cranch 282; 7 Cranch, 208 and 408; 5 Taun. 814; 1 Eng. Com. Law Rep. 276 and 423; 6 Taun. 394; The Silver Lake Bank *v.* A. & S. E. Hardin, Ohio Rep. 430; Adair's adm'r *v.* Rodgers' adm'r, Wright's Ohio Rep. 428.

Grimes & Browning, for defendant in error, contended that the variance could not be taken advantage of by the plaintiff in error, because it was for his benefit.

By the Court, Williams, Justice. — This was an action of debt, brought upon a judgment, obtained by the defendant against the plaintiff in error, in the Circuit Court of Adams county, in the state of Illinois. The declaration in the Court below sets forth the amount of the said judgment to be $834,41, adjudged to the plaintiff below "for his damages which he had sustained as well by reason of the non-performance by the said defendant of certain promises and undertakings entered into by the said defendant, to the said plaintiff, before the setting of said Court, as for his costs and charges, by him the said plaintiff in said suit expended." The record produced on the trial, showed a judgment for $834,41 damage, besides his costs. This variance was objected to on the trial, but the judge overruled the objection, and judgment was rendered for the plaintiff below; to reverse which the cause has been brought into this Court by a writ of error.

On the part of the defendant in error, it is contended that the variance objected to is not such as to prove fatal on the trial; that the effect of it was merely to diminish the amount of the judgment, which would otherwise have

been rendered against the defendant below, and that it was therefore wholly for his advantage. If these positions are all tenable, the judgment below must be affirmed, for this Court would never disturb such a judgment on account of an error clearly in favor of the party seeking such reversal.

So far as concerns the present suit merely, there is no doubt but the variance objected to operated beneficially to the defendant below. The plaintiff claimed $834,41 for his damages and costs recovered in the Adams county Court. His recovery in the Court below must have been limited to that sum; whereas if he had stated his claim truly, and produced the requisite evidence, he might in addition thereto, have recovered the costs of the original suit.

*But the same argument might have been used, if *47
the declaration had described the original judgment as having been for $500 instead of $834,41. In that case, however, the ready answer would be suggested that such a recovery would not be a sufficient protection against subsequent suits for the same subject matter. Would that same answer be applicable to the present argument?

Had the declaration been silent as to whether the amount set forth were for damages and costs, or for damages only, it would have been sufficient. The case would then have been brought within the rule laid down in Story's pleadings, page 336, and followed in the case of Adair's adm'r *v.* Rodgers' adm'r, Wright's Ohio Reports, 428. But in the present case, the declaration is not silent as to costs, but it expressly avers that the sum of $834,41 is the amount of damages as well as costs. It is true, the amount of those costs does not appear, but we are bound to presume they were something, and, consequently, the amount of the judgment described in the declaration must have been essentially different from that in the transcript produced on the trial. The reason of the rule in Story's

pleadings appears to be, that costs are an appendage, rather than a material portion of the judgment. Had the declaration been silent as to costs and had the amount of the original judgment as therein stated been found exactly equal to the damages alone as set forth in the transcript, there would have been no essential variance.

The same would probably also have been the case if the amount set forth in the declaration had, under the same circumstances, been found exactly equal to the damages and costs, both as stated in the transcript. In either of these cases, the exact correspondence of sums would have furnished so strong a presumption of identity, as sufficiently to protect the defendant from a subsequent suit on the same judgment.

But in the present case, although there is this exact correspondence of sums, the identity is negatived by the express averment, that the one is the amount of damages and costs, and by the strongest evidence, that the other is the amount of damages only. The judgment described and that produced in evidence, are essentially different, and there is weight in the argument therefore, that if the defendant below were again to be sued on the same judgment, he would find much difficulty in defending himself by producing proof of the recovery had against him here. Although, therefore, we are resolved to lend no countenance to those unmeaning technicalities, and absurb quibbles, which, much to the discredit of the legal profession, and to the prevention of justice, have in some countries been tolerated and even fostered, we are compelled
*48 to respect *a salutary rule, although in some instances it may operate with severity and even with seeming injustice.

In coming to this conclusion, we find ourselves sustained by the highest authorities. The slightest variance in any essential portion of the description of a written instrument, or of a judgment, has always been held fatal, unless

it should conclusively appear that the mistake could not operate prejudicially to the party wishing to take advantage of it. Many of the cases cited by the counsel for the plaintiff in error sustain this position, and none of those produced on the other side seem to contradict it. The judgment below will, therefore, be set aside, and a new trial ordered.

COMMISSIONERS OF JEFFERSON COUNTY *v.* FOX *et al.*

Error to Jefferson.

A bond, payable to A B alone, is a negotiable instrument under our statute.

Money paid thereon by the maker before it becomes due, is paid at his peril, whether he pays the same as garnishee or otherwise.

The maker is not liable on a garnishee process, unless the instrument is due, and shown to be in the possession of the defendant in the suit.

Under our statute, it seems a person cannot make a note, bond, &c., which shall not be negotiable (*s*).

The action was brought on the following instrument: "We, the county commissioners of the county of Jefferson, in the territory of Iowa, hereby bind ourselves and our successors in office, to pay to William Olney of said county, the sum of six hundred and fifty dollars, on or before the fifteenth day of November, 1839. Said money is to be paid for the building of a court-house in the town of Fairfield, in said county, which house is particularly described in a certain bond, bearing even date herewith,

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(*s*) The statute of 1839, under which this decision was made, is no longer in force in Iowa.

signed by the said William Olney, and also by Cyrus Olney and John A. Pitzer, to which bond reference is hereby had and made. Done at Fairfield, this 25th day of May, 1839.

"JOHN J. SMITH, [SEAL.]
"DANIEL TEAS, [SEAL.]"

Which bond was duly assigned to the defendants in error, on the 13th day of November, 1839.

*49 *The case was submitted to the Court below on the following agreed state of facts:

"The defendants confess the plaintiff's bill, and allege payment to Olney, the payee of the bond, under the following circumstances: The labor for which the bond was given not being completed on the 15th of November, the day the bond became due, an extension of time until the 15th December was given to complete the same; on which day it was completed, and notice thereof given to the clerk of the board of commissioners. On the 21st December, the defendants met and accepted the work. On this day also, which was the first time the commissioners (defendants) had met after the assignment of the bond to the plaintiffs, notice was given the defendants of the assignment of the bond, and payment demanded by the plaintiffs, of the amount still due on the bond, to-wit: $150. The defendants refused payment to the plaintiffs, saying that they gave their obligation to Olney, and would recognize no assignees; and if the plaintiffs felt themselves aggrieved, they must seek redress elsewhere. On the 18th day of December, whilst the defendants were not yet notified of the assignment, they were summoned as garnishees, in three several suits, wherein Olney was defendant, before a justice of the peace, and in answer to interrogatories acknowledged themselves indebted to Olney, and three several judgments, were thereupon rendered against them, amounting, in all, to $113.13. From which

judgments the defendants refused to appeal, though requested so to do by the plaintiffs. At the time of the rendition of the judgments there was due on the bond to the plaintiffs $150.50, and also, for extra work there was due to Olney, $45.50, amounting in all to $195.50, leaving, after deducting the amount of the judgments, a balance of $82.37, which the defendants, on the 21st December, after notice of the assignment and demand of payment by the plaintiffs, paid to Olney."

Upon this state of facts the Court below rendered judgment against the commissioners for $150, together with interest and costs, upon which the case was brought here by writ of error.

Learned & Woods, for plaintiffs in error, contended that the defendants below were safe in paying money on the bond at any time previous to notice of assignment, and that having become bound by their answers on the garnishee processes, prior to receiving such notice, they stand in the same situation in this particular, as though they had at that time made an actual payment.

That the $45.50, for extra work, was not affected by the assignment *and the plaintiffs in error had a le- *50
gal right to apply that sum towards the extinguishment of the balance of $82.37, paid to Olney, after the judgment against them as garnishees; so that if any judgment at all had been rendered, it should have been for $36.87 only.

They also argued, that the bond was conditional, and not for the absolute payment of money or other property, and, therefore, was not negotiable under the statute; that the work was not finished when the bond was assigned, and when the garnishee process was served.

That it was sufficient that the county commissioners had to pay this money in pursuance of the judgment of a competent tribunal, and that the plaintiffs below might have

appealed from that decision, if they believed it erroneous.

By the Court, Mason, Chief Justice.— From the facts agreed upon in this case in the Court below, it appears that the plaintiffs in error made a contract with William Olney for building a court-house, and gave him their writing obligatory, by which they bound themselves to pay him the sum of $650, on or before the 15th day of November, 1839. Partial payments were made upon this bond, but before the time of payment therein specified, and while $150 dollars remained unpaid, it was assigned by Olney to the defendants in error. Before the obligors were notified of the assignment, they were summoned as garnishees, in three several suits against Olney, and judgments thereon were rendered against them amounting to $113.13. At the time of the rendition of this judgment, the county commissioners were indebted to Olney, to the amount of $45.50, for extra work; and after they had received notice of the assignment of their obligation, they paid him not only this amount, but also the balance which they admitted to be due on the bond, amounting in all to the sum of $82.37.

The Court below decided that under the provisions of the statute of Iowa, in relation to promissory notes, &c., which took effect on the first day of March, 1839, this bond was a negotiable instrument, and on that account the plaintiffs in error were not liable as garnishees in any action against Olney, and that whatever was adjudged against them in that capacity would not prejudice the rights of the defendants in error. A judgment was therefore rendered against the county commissioners for $150, together with interest and costs. To reverse that judgment the case is now brought into this Court.

The main question seems to be, whether the bond on which this suit was institnted was negotiable under
*51 our statute. This extends to all *notes, bonds, due bills, and other instruments in writing, for the pay-

ment of any sum of money, or articles of personal property, &c. It is contended, that this instrument is conditional, and not for the absolute payment of money, and on that account is not reached by the provisions of the statute just referred to.

It is true, the bond states that the amount therein specified is to be paid for the building of a court-house, but we find nothing in it which can be called a condition. The obligors bind themselves absolutely to pay William Olney the sum of $650, on or before the 15th day of November, 1839, and the instrument then goes on to state the consideration for which the money is be paid. We therefore conclude that the bond in question is a negotiable instrument, the legal interest of which vested at once in the assignees, in pursuance of the statute.

It may well be urged, that the maker of a bond should have the privilege of executing an instrument which would not be assignable in such a manner as to prevent him, without hazard, from making a payment to the obligee at any time before he received notice of the assignment. Our statute, however, declares otherwise. The fourth section of the act in relation to promissory notes, &c., already mentioned, leaves no doubt on the subject, if the first section of that act were not sufficiently explicit. It declares that if "any such note, bond, bill, or other instrument of writing, shall be endorsed before the day the money or property therein mentioned becomes due and payable, and the endorsee shall institute an action thereon, the defendant may give in evidence at the trial, any money or property actually paid on the said note, &c., before the same was endorsed, as assigned to the plaintiff *by proving that the plaintiff had sufficient notice of the said payment before he accepted or received such endorsement.*"

This section fully negatives the position that the assignee is bound to give notice to the obligor of the assignment, before the obligee's right to receive payment and receipt

therefor, is cut off. The obligor can only set up such payment, in his defence, by proving that the assignee had sufficient notice of the same, before the note was assigned. No notice of this kind seems to have been proved in the present case, and the payment as garnishee is not distinguishable in this respect from an ordinary payment. The maker of a negotiable instrument, cannot be made liable on a garnishee process, unless that instrument has become due, and is shown to be then in the possession of the defendant in the suit.

*52 *The decision of this point obviates the necessity of examining the others.

Judgment affirmed.

JOSEPH CANE and others *v.* JOHN W. WATSON.

Error to Louisa.

Appearance and pleading in the District Court, on appeal, waives all defects in the service of process, &c., in the original proceeding before the justice of the peace (*t*).

The District Courts may amend a verdict in matter of form, at any time before final judgment is rendered, although at a subsequent term of the Court (*u*).

This Court will not disturb a judgment on account of any defect in the form of the verdict, provided the intention of the jury is unequivocal and evident.

In trespass against several defendants, a general verdict for the plaintiff, without specifying against which of the defendants, will be understood as applying to all.

(*t*) As to the effect of an appearance, see the following authorities: Rev. § 2840; Hale *v.* Van Saun & Hunt, 18 Iowa, 19; Burns *et al.* *v.* Heas *et al.* 20 Iowa, 16; The Des Moines Branch, &c. *v.* Van *et al.* and Allen *v.* Culver & Co. 12 Iowa, 523.

(*u*) See the authorities cited in note (d) to Gordon & Washburn *v.* Higley, *ante*. p. 18.

Joseph Cane and others *v.* John W. Watson.

An action of trespass *quare clausum fregit* was brought before a justice of the peace, by John W. Watson, against Joseph Cane, John H. Henderson, Ebenezer Carmichael, Arthur Carmichael, Alexander Hamilton, Samuel Bell and William Bell. The two latter were not served with process. The transcript of the justice sets forth, however, in general, that *the defendants appeared*, and that a verdict of guilty was found against them. An appeal was then taken to the District Court.

In that Court, the defendants, Cane, Hamilton and Arthur Carmichael appeared in the first instance, and filed a plea of "not guilty." All the original defendants afterwards appeared by their counsel, and moved to dismiss the suit, for reasons appearing on the face of the papers, which motion the Court overruled. And thereupon the defendants pleaded "*not guilty*." Upon this issue being joined, the jury found the following verdict: "We, the jury, find for the plaintiff, and assess his damages at twenty-five dollars." A motion in arrest of judgment was then filed and the cause contained till the next term.

At the next term the Court directed that the verdict be amended in matter of form, and that judgment be rendered thereon. The case was afterwards brought to this Court on writ of error.

Grimes, for plaintiff in error.

*Springer & Woods, for defendant in error. *53

By the Court, Mason, Chief Justice. — This suit was brought up to the District Court by appealing from the judgment of a justice of the peace. Two of the defendants, William and Samuel Bell, were not served with process. The transcript of the justice, however, states that the plaintiff and *defendants* appeared on the day set for trial. The appearance of the two Bells would have superceded the necessity of service.

It is urged, however, that the word "*defendants*," in the transcript, ought to be understood as referring only to those who have been duly served with process. Such, however, does not seem to have been the understanding of the justice, for he afterwards states that "the *defendants*, Samuel Bell and William Bell, filed their bond for an appeal."

But whether the record would justify the conclusion, that these defendants appeared in the justice's Court or not, it clearly shows an appearance in the District Court. The three other defendants had pleaded the general issue, after which a motion was made to dismiss the suit, in which all the defendants are named. This being overruled, the *defendants* pleaded "not guilty," and issue was joined thereon. The defendants here mentioned must necessarily include the two Bells, for they were the appellants in the case, and they, in particular, had joined in the motion to dismiss. Appearing and submitting to a trial was, we think, a waiver of all objections to any preceding irregularity.

Another objection urged is, that the Court permitted the verdict of the jury to be amended at the next term after it was rendered. A motion in arrest had been made, immediately after the trial, and the cause continued. The amendment of the verdict took place before the judgment was rendered. It makes no difference whether this was at the trial term or not. An amendment by the Court in matter of substance would be error if made at any time; but if in mere matter of form, it would never be such an irregularity as could be rectified here. The District Court has control of its own records, so far as to direct the form in which entries shall be made therein, but must never alter substantial facts. If, therefore, the change in the verdict was such as the Court might have made at the very time it was rendered, without the express assent of the jury, it was perfectly competent to direct the alteration at the time alleged in this case.

This Court will not disturb a judgment on account of any defect in the *form of the verdict, provided the *54 intention of the jury is unequivocal and evident.

In this case, we think there can be no mistake as to what the jury intended, in their original verdict. The plaintiff charged the defendants below with the commission of a trespass. They pleaded "not guilty." Issue was thereupon joined and the jury "found for the plaintiff." Although, as was urged by counsel, it is not stated as to which of the defendants they find for the plaintiff. The same objection might have been urged with equal force had there been a general verdict of "guilty." It applies to all the defendants. If, therefore, we would not have disturbed the judgment for the defective verdict, had the same not been amended, we certainly shall not under present circumstances.

The judgment below will, therefore, be affirmed.

CAROTHERS *v.* CLICK.

Error to Muscatine.

The process of attachment is merely auxiliary, and intended in certain cases to seize the property of the defendant, and hold it to abide the result of the suit. When judgment is rendered, the efficacy of the writ of attachment is expended (*v*).

However defective, therefore, the affidavit or bond may be, upon which the writ issued, judgment will not on that account be reversed (*w*).

(*v*) Elliott *v.* Mitchell, 3 G. 237; Bowen *v.* Lamb, 4 Gr. 468; Johnson & Stevens *v.* Butler, 1 Iowa, 459; Sackett, Belcher & Co. *v.* Partridge & Cook, 4 Iowa, 416; Shapleigh *et al.* *v.* Roop *et al.* 6 Iowa, 524.

(*w*) A defective affidavit in an attachment proceeding may be amended, as a matter of right, before or during the trial of the cause. Rev. § 3242; Wadsworth & Wells *v.* Cheeney & Stinson, 13 Iowa, on p. 578; McCarn & Scott *v.* Scott *et al.* 7 Iowa, 404.

The proper mode of taking advantage of such defects, is to move, at the proper time, to quash the writ of attachment.

The errors assigned are,

1. The affidavit on which the attachment was issued is not in compliance with the statute.

2. The paper purporting to be a bond by the attaching creditor is not a bond — not being sealed by the creditor and his security.

3. The process of attachment is served, not by the sheriff, but by one C. Lawson, deputy sheriff, M. Co.

4. There is no judgment rendered against the property attached, but a general judgment against the party.

The affidavit stated that deponent was "*apprehensive*" that Carothers would dispose of his property, whereas, the statute requires him to swear that "*he verily believes, &c.*"

*55 *Grant, for plaintiff in error.

Whicher & Lowe, for defendant in error.

By the Court, Mason, Chief Justice. — For the purpose of reversing the judgment below, the plaintiff in error relies, 1. Upon the fact that the affidavit which formed the basis of the writ of attachment, was wholly insufficient. From an examination of the affidavit, we are satisfied that it is so defective as to have been successfully objected to by motion to quash the writ of attachment. It forms no ground, however, for reversing the judgment. Neither would the second and third objections avail for this purpose, however valid soever they might be in an earlier stage of the proceeding.

The last objection is equally unfounded, the proceedings in that respect having been strictly regular. The counsel for the plaintiff in error seem to have taken an incorrect view of the nature of the writ of attachment. It is not an independent proceeding, but one that is wholly auxiliary. Where a debtor has absconded, or is a non-resident of the

territory, so that the ordinary process cannot reach his person; or where he is about to dispose of his property with intent to defraud his creditors, this remedy is given for the purpose of securing his property, and holding it within reach until the termination of the suit. It is, then, to be advertised and sold, in the same manner as though it had been levied upon by writ of *fieri facias*.

It is, therefore, a separate proceeding, collateral to the ordinary suit, commenced by capias or summons, or (where the defendant cannot be found) by advertisement. In any of these cases, the whole object of this writ is to seize and hold the property of the defendant, or its equivalent, to abide the event of the suit. If the plaintiff recovers, the property is, by operation of law, to be considered as having been levied upon by execution. The judgment is rendered against the defendant, and the other result follows as a matter of course. No special judgment is necessary against the property, for the statute has already prescribed the consequences of the judgment.

As soon as the judgment is rendered the efficacy of the writ of attachment is expended, and although the proceedings under it may have been irregular, those in the primary suit have not thereby been vitiated so as to be reached by writ of error. The judgment below is, therefore, affirmed.

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*Smith *v.* Cutler, Administrator of Cutler. *56

Error to Des Moines.

Where the defendant pleads *nil debet* to an action on a speciality, the plaintiff cannot treat it as a nullity, but should demur (*x*).

(*x*) The distinction between sealed and unsealed instruments abolished by the Revision, §§ 1823, 1824. So also the old forms and rules of pleading, § 2606.

Smith v. Cutler, Administrator of Cutler.

This was an action of debt, brought by the defendant in error against the plaintiff in error, upon a note *under seal*. To the plaintiff's declaration the defendant files the plea of *nil debet*, with notice of special matter under the statute. At the February term, 1840, the plaintiff's attorney moved for a judgment for want of a plea, which motion was sustained, and judgment rendered accordingly.

The errors assigned are as follows; to wit:

1. That the Court erred in rendering judgment for the plaintiff, on motion, as there was a plea on file.

2. That the plea of *nil debet*, filed by the defendant, was good without demurrer, even where the action was on a writing obligatory.

3. That under the statute and laws of the territory, the instrument on which the action was brought was a simple contract *sui generis*, and as such *nil debet* is the proper plea.

GRIMES & WOODS, for plaintiff in error.

ROBER & STARR, for defendant in error.

BY THE COURT, WILSON, JUSTICE. — We will first consider whether the plea of *nil debet* was a proper plea in this case. The statute approved January 25, 1839, sets forth that "the defendant, in all cases, may plead as many matters of fact in several pleas as he may deem necessary for his defence; or may plead the general issue and give notice n writing under the same, of the special matters intended to be relied on for a defence on the trial; under which notice, if adjudged by the Court to be sufficiently clear and explicit, the defendant shall be permitted to give evidence of the facts therein stated, as if the same had been specially pleaded, &c." Was the plea of *nil debet* the general issue in this case?

In debt and simple contracts, or legal liabilities, the gen-

eral issue is *nil debet*. 1 Chitty's Pl. 476. There can be no doubt but that the *founndation of the present *57 action, is neither of these. It is a speciality, and the position assumed by the third assignment of errors "that the instrument on which this action was brought is a contract *sui generis*," is untenable. "Where the deed is the foundation of the action, although extrinsic facts are mixed with it, the defendant must plead *non est factum*, and *nil debet* is not a sufficient plea, as in debt on a speciality, on articles of agreement, or on a bail bond, &c. If in such cases *nil debet* be pleaded, the plaintiff should demur, for if he do not, he will have to prove every allegation in his declaration, and the defendant will be at liberty to avail himself of any ground of defence which in general may be taken advantage of under the latter plea. Chitty's Pl. 478. Although we are fully satisfied that the plea was not a good one, yet the authority cited is conclusive. The plaintiff should have demurred.

The following is cited by the defandant in error, from 1 Tidd's practice, 505. "When the defendant pleads a plea, not adapted to the nature of the action, as *nil debet* in assumpsit, the plaintiff may consider it as a nullity, and sign judgment." This signing of judgment refers to the practice in many Courts of signing judgment in vacation in the clerk's office. But in the same paragraph the following is laid down: "The plea of *not guilty*, in an action of *debt* on a penal statute, is not such a nullity as will warrant the plaintiff in signing judgment. If the defendant, when under an order to plead issuably, put in a plea which, though informal, goes to the substance of the action, the plaintiff cannot sign judgment as for want of a plea. And in general, when the defendant pleads an improper plea, the safest course is not to sign judgment, but to demur, or move the Court to set it aside." In the case of Meyer *v.* McClean, 2 Johns Rep. 183, it was decided that "where the defendant pleaded *nil debet* to an action of debt, on a

judgment recovered, and gave notice of special matter to be offered in evidence, and the plaintiff went to trial on this plea, it was held that he could not afterwards arrest the judgment, on the ground that the plea was a nullity." And the Court in that case intimate a doubt whether it is not a sufficient general issue, for the purpose of merely upholding notices of payment under their statute, which is similar to ours. Without deciding this query, we are of opinion that plaintiff should have demurred, and that taking judgment in such a summary manner, was irregular.

Judgment below is reversed, and a new trial awarded.

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*58 *PORTER & BRAZELTON *v.* HOSEA MOFFETT.

Error to Henry.

Where, after plea, the declaration is amended and then refiled, the old plea is no longer a plea to the new declaration without being refiled, especially after the defendant has been ruled to plead anew (*y*).

The facts of this case are set forth in the opinion of the Court.

HALL, for plaintiffs in error.

J. B. & G. W. TEAS, for defendant in error.

BY THE COURT, WILSON, JUSTICE.— This was an action of covenant, brought by Moffett, against Porter & Brazelton, to April term, 1839. On the 14th of March, 1839, a declaration was filed by plaintiff, to which a plea of *non est factum*, with notice of special matter, was filed at the

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(*y*) Wilson *v.* Preston *et al.* 15 Iowa, 246.

April term, 1839. At the same time the plaintiffs asked and obtained leave to amend their declaration, upon the payment of all costs, and filed an amended declaration on the first of May, 1839. At the August term, 1839, the parties appeared by their attorneys, and, by consent of parties, the cause was continued, and the defendants ruled to plead by the first of January, following. Default was entered in vacation against defendants for want of a plea, which default was confirmed at the March term, 1840, and an assessment of damages by a jury. At the same time a motion in arrest of judgment was made, which was withdrawn, and judgment rendered on the verdict.

There are five errors assigned, but they are all contained, substantially, in the fifth. It is contended by the plaintiff in error, that there was no default; that the plea filed to the first declaration should have been considered as answering the amended declaration.

We cannot come to this conclusion. Where a declaration which is pleaded to is withdrawn for amendment, is amended and refiled, it is viewed as a declaration, and its withdrawal would seem to render a nullity any plea to it. The foundation being removed, the superstructure must fall.

But, further it appears from the record that at the term subsequent to the one at which the plaintiff filed his amended declaration, the parties appeared, and by consent of the parties the cause was continued, and *the defendants ruled to plead by the first of January, then next ensuing. Here was a peremptory rule of the Court, which was not complied with, on which non-compliance the defendants were in default, and in the confirmation of which we see no error. *59

Judgment affirmed.

Maltby & Bolls, for the use of Whetley, *v.* Cooper.

Error to Des Moines.

Where actions on the case are mentioned in general terms, assumpsit is included.

Statutes of limitations may be made to take effect on antecedent contracts (*z*).

By our statute, five years are sufficient to bar an action of assumpsit on a promissory note, though in an action of debt six is required (*z*).

The legislature has power to pass such a law, to operate on cases where five years shall have already elapsed.

Cooper had given three promissory notes to Maltby & Bolls, which were due in 1833. The statute of limitations had been running in relation to them between five and six years, when an action of assumpsit was brought thereon. The statute of limitation was pleaded, to which there was a general demurrer, which was overruled by the Court.

William H. Starr, for plaintiff in error, argued:

1. That the act of the legislature of Iowa, approved January 25, 1839, could not be so applied to this case as to limit the time of bringing suit to five years, inasmuch as five years had already elapsed when the statute was passed.

2. That the same act should not be so construed as to allow a writ to be brought on a promissory note, in one form of action, at any time within six years, and in another form of action limit it to five years.

(*z*) Sleeth *v.* Murphy, *post*, 321; Morris *v.* Slaughter, 1 Gr. 338; Phares *v.* Walters, 109; Montgomery *v.* Chadwick, 7 Iowa, 114; Campbell *v.* Long *et al.* 20 Iowa, 382.

3. That even if five years had not already elapsed, it would be giving a retrospective operation to the statute to apply the five year rule to this case.

Robbb, contra, cited Lord *v.* Sheldon, 3 Cond. Rep. 131; 3 Peters, 378; 11 Wheat. 316 and 361; 6 Am. Com. Law, 477 and 496; 3 *Bing. 329; 11 Eng. Com. *60 Law, 124–5–6; 3 Wheat. 541; 9 Serg. & Rawle, 288; 2 Rand. Rep. 303; 13 East, 439; 2 Mass. 84; 5 Jones, 132; 3 Johns. 263; Comyn on Contracts, 68; 2 Hen. and Mumford, 289; 6 Mass. 328; 1 Wheat. 292; 3 Conn. 398; 3 McCord, 455; 7 McCord, 139.

By the Court, Mason, Chief Justice.—This was an action of assumpsit, brought upon three promissory notes, given by the defendant to the plaintiffs, dated at New York, in the autumn of 1832, and payable at the United States Branch Bank, at Louisville, Kentucky, at different times in the year 1833. The defendant pleaded the statute of limitations for his fourth plea, averring that the causes of action did not accrue within five years next before the commencement of this suit. To this plea there was a general demurrer and joinder. The Court overruled the demurrer, and gave judgment for the defendant; and the plaintiff brought his writ of error to reverse that decision.

The first inquiry will be, as to whether five years is the period of limitation fixed by our statute for actions of this nature. The first section of the act in relation to the limitation of actions, passed January 25, 1839, and which was in force when this suit was brought, declares, "that all actions of trespass, detinue, trover, and replevin, for taking away goods and chattels, all actions for the arrearages of rent due on a parol demise, and all actions of account and *on the case*, except actions for slander and malicious prosecutions, &c., shall be commenced within five years next after the cause of actions shall have accrued, and not after."

The fourth section of the same act fixes six years as the period of limitation for actions of debt, founded upon a promissory note, &c. The question, therefore, will turn upon fact as to whether the first or fourth section is to govern this case. Does an "*action upon the case*," mentioned in the first section, embrace the action of assumpsit? It is true, that when we speak of actions *upon the case*, we are generally understood to mean actions founded upon *torts*; but it is also true, that *assumpsit* is also a species of *action on the case.*

To arrive at a satisfactory conclusion in this case, therefore, it may be well to refer to the English statute on this subject—which is the basis of our own—and to the construction which has invariably been placed upon the former. That statute makes no mention of the action of *assumpsit*, but speaks of *actions on the case*, and in other respects makes nearly the same enumeration as is to be found in the first section of our statute. The Courts in Eng-

*61 land have, however, held, that the action of *assumpsit is therein included. Under these circumstances, our own legislature, in following the phraseology of the English statute, must be presumed to have regulated their intentions in accordance with the English decisions. This would be the only safe rule in relation to the meaning of terms in legal enactments.

But is contended, that although this might have been the intention of the legislature, they have no power to pass a statute of this nature, that shall operate upon the present case; for that the five year limitation had already expired when this statute was enacted, although from the defendant's having been absent from the territory during a portion of the time, six years had not then elapsed.

The legislature certainly could not by statute impair the obligations of a contract; still, it is well settled, that even in relation to antecedent contracts, it is competent for them to change the remedies by which those contracts are

to be enforced. We are not aware that any limit has been placed to the exercise of this power, except the good sense and discretion of the legislators, themselves.

Satutes of limitation relate to the remedy, and not to the substance of the contract. They seem to be merely a rule of evidence, creating a legal presumption of payment, after a particular lapse of time. Sturges *v.* Crowninshield, 4 Wheaton. They may, therefore, be made to operate upon prior contracts without impairing their obligation.

It is urged however, that to give the statute force in the present case, would be to take away the remedy altogether; and that this would be very different from merely changing that remedy. But, is this true? The plaintiff might have brought the action of debt, and then the period of limitation would have been *six* years, the same as under the old law. The case seems to be this: Our former statute, in accordance with the law of England, as well as with that of most of the states of the Union, fixed the period of limitation to all actions on promissory notes at six years. To the operation of such a law therefore, the plaintiff could not object. The new statute of the territory gave the creditor the same length of time as before, provided he brought the action of *debt*, but limited the term to five years in case the action were *assumpsit*. Now, we regard it as perfectly within the power of the legislature, to abolish the action of assumpsit altogether, or they can prohibit a resort thereto for the collection of promissory notes. Or, finally, they may declare that the action of assumpsit shall not be brought on a promissory note after the lapse of one, two, three, four, or five years from the time the case of action shall have accrued. And, provided a method is still *left by which the holder of such *62 note may bring suit thereon, within the period formerly limited by statute, certainly the remedy cannot be said to be taken away altogether. Such is the case in the present instance. A remedy abundantly sufficient is still

left the plaintiff, and the period of limitation is not even curtailed.

There is no weight in the objection that the legislature cannot limit the period for bringing assumpsit to five years, and, for the same cause of action, extend it to six, in case the action be debt. Although we do not fully comprehend the reason for such a distinction, still we think it a matter left wholly to the wisdom and discretion of the legislature.

The judgment below will, therefore, be affirmed.

W. Y. Decker & Co. *v.* Birhap, for the use of Hooper, Peck & Scales.

Error to Dubuque.

When a mere simple contract is the foundation of the action, the plaintiff must allege a consideration. Except in the case of notes, bills of exchange, &c (*a*).

An order to deliver lead, made prior to the present statute of Iowa, in relation to promissory notes, &c., is not one of these exceptions.

In declaring on such an order, the plaintiff must not only set forth a consideration, but he must aver a prior demand, and prove it.

This was an action of assumpsit, at the suit of J. M. Birhap for the use of Hooper, Peck & Scales, against Wm.

(*a*) By § 1824, all contracts in writing signed by the party to be bound, &c.,' import a consideration in the same manner as sealed instruments, and bills and notes, so that it is unnecessary to allege a consideration in an action on a simple written contract. Henderson *v.* Booth, 11 Iowa, 212. But the want of consideration in whole or in part may be shown as a defense (see Rev. § 1825), and when relied on as such should be pleaded in the answer. See Wright & Wright *v.* Wheeler, 14 Iowa, 8; Linder *v.* Lake, 6 Iowa, 167; Johnson *v.* McGrew, 11 Iowa, 151; Jones *v.* Berkshire, 15 Iowa, 248.

Y. Decker & Co., brought to recover the value of 5000 pounds of lead. The plaintiff declared upon an order in words as follows; viz:

"Messrs. Wm. Y. Decker & Co.—Gents.—Please deliver A. E. Hough five thousand pounds of lead on my account.

"April 2, 1838. THOMAS MANCHESTER."

On the back of which order is the following endorsement in writing:

"Please deliver the within five thousand pounds of lead to Mr. J. M. Birhap.

"April 4th, 1838. A. E. HOUGH."

Thereupon the plaintiff filed his declaration in assumpsit, as follows:

J. M. Birhap, for the use of William H. Hooper, George Peck & *Samuel Scales, partners under the *63 style and firm of Hooper, Peck & Scales, plaintiffs in this action, complain of Wm. Y. Decker, and Thomas McKnight, late partners under the style and firm of William Y. Decker & Co. of the plea of assumpsit; for that one Thomas Manchester did, on the second day of April, in the year 1838; to-wit: at the county of Dubuque make and sign a certain draft or order, in words following; to-wit:

"Messrs. Wm. Y. Decker & Co.—Gents.—Please deliver A. E. Hough five thousand pounds of lead on my ac. (meaning my account.)

"April 2, 1838. (Signed) THOMAS MANCHESTER."

"Which said draft or order the said Manchester did then and there deliver to said A. E. Hough; and he, the said A. E. Hough, did, on the fourth day of April, in the year 1838, at the county of Dubuque aforesaid, endorse, assign, and deliver over to said J. M. Birhap the said draft or order. And the said defendants, partners as aforesaid,

did, then and there, accept the said draft or order, payable to said Birhap as aforesaid, whereby the said defendants became indebted to, and liable, and did then and there assume and promise to pay said Birhap, who sues as aforesaid, the said five thousand pounds of lead, when the same should be demanded; to-wit: at the county aforesaid. And the said plaintiff avers that the said lead was worth, and equivalent to, the sum of two hundred and fifty dollars, lawful money of the United States, which said sum the said defendants became then and there liable, and then and there did assume and promise to pay said plaintiff who sues aforesaid, whenever the same should be demanded. And yet, the said five thousand pounds of lead, or the said sum of money, they, the said defendants, have not paid although often thereto requested, but to pay the same, or any part thereof, have hitherto wholly neglected and refused, and still do neglect and refuse, to the damage of the said plaintiff four hundred dollars, and therefore he brings suit."

Issue was thereupon joined, on defendant's plea of "non-assumpsit," and the cause having been tried in the Court below, the plaintiff obtained judgment for the sum of one hundred and seventy-one dollars, damages, together with costs of suit.

The cause having been brought here by writ of error, the plaintiffs in error ask that the judgment of the Court below be reversed, because,

1. There is no consideration alleged in the declaration on which to found a promise and undertaking of the defendant to pay.

*64 *2. The instrument declared on is payable in lead, and the declaration contains no averment of a demand for said lead.

There were some other points of error alleged in the assignment, but the above were relied on as sufficient for the plaintiffs in error.

PER CURIAM, MASON, CHIEF JUSTICE. — The instrument on which this action is founded is a simple contract. When the plaintiff brought his suit, it was incumbent on him to seek his remedy by declaring in accordance with the well-established rules of pleading. The rule is, that where a mere simple contract is the foundation of the action, the plaintiff must allege a consideration. This rule has been held requisite except in some peculiar instances; such as actions brought upon bills of exchange, &c. The present action cannot be saved by the exception. The declaration sets forth no allegation of a legal or good consideration. In this there is error, and such should have been the decision of the Court below. *Vide*, Law on Pleading, 49, 58, 301; Chitty's Pleadings, 320, 321; 1 Saund. on Pl. and Ev. 114.

The second error assigned is also good for reversal. The plaintiff below should have set out in his declaration, a demand made of the defendant, for the specific article called for by the order. Without proof of such demand before the jury, he could not recover *in money* the value of the lead. Every material allegation should appear in the declaration. Such is the character of the instrument here declared on, that the plaintiff was bound to aver a demand and prove it. The rule is "that where an instrument of writing contains a promise to pay in a specific article, which cannot attend the person of the debtor, it is supposed to be at his place of residence, and the creditor must there demand the payment, before he can maintain his action for the value thereof in money. Chipman on Contracts, 28; Saund. on Pl. & Ev. 131; Chitty's Pl. 362.

The judgment reversed, and a new trial ordered.

John Lorton *v.* Samuel C. Agnew.

Error to Des Moines.

Where the record shows itself incomplete, the defeat will be regarded the most strongly, possible, against the plaintiff in error (*b*).

*65 *Where a special agreement is made to rescind a former contract and repay a certain portion of the money advanced, that money cannot be recovered under the common counts, but the declaration must be special (*c*)

The rule in such cases is, that the plaintiff cannot recover on the common counts unless there is sufficient evidence to warrant a recovery, independent of the special agreement.

The facts relied on are all contained in the following bill of exceptions, filed in the Court below at the time of trial:

"Be it remembered, that on the trial of this cause, it appeared in evidence that Agnew had purchased from Lorton a claim and improvements thereon, some time in November, 1837; that he took and continued in possession of the same up to the 17th of November, 1838; that he had paid to Lorton one hundred and thirty-five dollars in cash, and one yoke of cattle, valued at fifty-five dollars; that some time previous to the 17th November aforesaid, he dispaired of paying the balance of the purchase money, and being unwilling to lose what he had paid, and the labor he had expended, agreed with Lorton (who consented) to leave it

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(*b*) Every presumption must be in favor of the correctness of the ruling, or other action of the Court below. The error must appear affirmatively, or it will not be considered. Pierce Bros. & Flanders *v.* S. E. Lock & Co. 11 Iowa, 454; Eubank *v.* Whitaker, *ib.* 197; Boker *v.* Chapline, 12 Iowa, 204; M. & M. R. R. Co. *v.* Byington. 14 Iowa, 572; Coldren & Co., *v.* Cole *et al.* 19 Iowa, 565; Oliver *v.* Townsend *et al.* 16 Iowa, 430; Barker *v.* Brown, 15 Iowa, 70; and where the record is confused and indefinite, or is silent, it will be presumed that the Court below acted according to law. Butt *v.* Tutthill, 10, Iowa, 585; State *v.* Schlagel, 19 Iowa, 169.

(*c*) All common counts are abolished by statute. Rev. § 2622.

to men selected by them to say on what terms he should surrender the claim to Lorton, and the contract of sale be abandoned; that they decided that Lorton should have immediate possession of the farm, except the house, which Agnew was to have the use of until November 1st, 1838; and that Agnew accordingly delivered possession; that Lorton should have half the crops raised on the place by Agnew, and that Lorton should pay to Agnew $135,00 in twelve months from this decision. Both consented, and Lorton promised to pay Agnew one hundred and thirty-five dollars accordingly, in twelve months.

Whereupon, defendant's counsel asked the Court to instruct the jury that the plaintiff could not recover under the count for money *paid, laid out, and expended*, which instruction was allowed.

Defendant's counsel then asked the Court to instruct the jury that the plaintiff could not recover the one hundred and thirty-five dollars under the count for money *lent and advanced*, which instruction the Court refused, but instructed the jury that under that count, in connection with the bill of particulars, they could find for the plaintiff on the foregoing evidence, provided, they found, from the evidence, that the original contract had been rescinded. Defendant's counsel further asked the Court to instruct the jury that, where there is an express subsisting promise or agreement to pay money, the plaintiff cannot recover the money upon the common money counts by proving such express *promise, but must sue on the express *66 promise or agreement, which instruction the Court refused."

Grimes & H. W. Starr, for plaintiff in error.

Rorer & Browning, for defendant in error.

By the Court, Mason, Chief Justice.—The plaintiff below brought an action of assumpsit against the defend-

ant Lorton, and complained against him in the two common counts for money lent and advanced, and for money paid, laid out and expended. It appears also that there was a bill of particulars of the plaintiff's demand, but it does not appear to have been sent up in the transcript of the record from the District Court.

On the trial (according to the bill of exceptions) it appeared that Agnew had purchased a "claim" of Lorton, which he took possession of and occupied for about one year; that he had paid therefor $135 in cash, and a yoke of oxen valued at $55; that finally, being unable to pay the balance, and unwilling to lose what money and labor he had expended, he agreed with Lorton to leave it to certain individuals to determine upon what terms the "claim" should be surrendered and the contract of sale abandoned. These men decided, among other things, that Lorton should pay Agnew $135 in twelve months. Both parties consented to this arrangement, and Lorton promised to pay the amount accordingly.

Upon this state of facts, the defendant's attorneys asked the Court to instruct the jury, "that the plaintiff could not recover the $135 on the count for money *lent and advanced*," which instruction the Court refused to give, but directed the jury, that under this count, taken in connection with the bill of particulars, they could find for the plaintiff, provided they were satisfied, from the evidence, that the original contract had been rescinded.

They further asked the Court to instruct the jury, "that where there is an express subsisting promise or agreement to pay money, the plaintiff cannot recover the money upon the common money counts, by proving such express promise, but must sue on that promise," which instruction was also denied; to both of which the defendant excepted. A verdict was found for the plaintiff, and judgment rendered thereon, for the reversal of which a writ of error is now brought to this Court.

As it is incumbent on the plaintiff in error to show affirmatively that *there was error below, in order to *67 obtain a reversal, and inasmuch as the bill of particulars is referred to in the record, and not contained in the transcript, the proper inquiry will be, whether, under the count for money *lent and advanced* coupled with any possible bill of particulars, the plaintiff below could have recovered. Perhaps under such circumstances any evidence would be admissible which could be admitted under the count, "for money had and received." Such a declaration, though defective in form, might at least be sufficient in substance to prevent a reversal in this Court, in any case where all the common counts would have sufficed.

The great question in this case, therefore, is, whether the plaintiff below was entitled to recover on the common counts, or whether he must have declared specially. From the circumstances of the case, there is nothing to create the presumption that Agnew, by abandoning the original contract, could compel Lorton to refund any of the money paid thereon. There was no legal liability upon Lorton to pay any money except from his promise and undertaking, then and subsequently made. The circumstances were such as might form the consideration for a promise, but the right of action resulted entirely from his special agreement.

The rule laid down in Suttler *v.* Mays, 7 Johnson's Reports, 132, and followed in the case of Dubois *v.* Delaware & Hudson Canal Company, 4 Wendell, 285, would not permit the plaintiff to recover on the common counts, unless there was sufficient evidence to warrant such a recovery, independent of the special agreement. That rule, applied to this case, would be decisive and fatal to the action below, and we find no reason or authority for establishing a rule irreconcilable with it. The rule, in all respects seems to be just and salutary, and we feel inclined to adopt it.

It is true, that where a contract has been rescinded, money paid thereon may be recovered under the common counts. This contract, however, does not seem to have been absolutely rescinded. Although, as it would appear, the jury found this to be the case, still, the matter involves a question of law, and from the facts detailed in the bill of exceptions, we are inclined to the belief that the grounds of the plaintiff's action below resulted, not from the abrogation of the old contract, but from the creation of a new one. The judgment below will, therefore, be set aside, and a new trial awarded.

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*68 *GRIFFEY *v.* PAYNE, for the use of Clark.

Error to Des Moines.

Partial failure of consideration, arising from breach of warranty, or otherwise, may be given in evidence in a suit brought on a promissory note (*d*).

A statute authorizing such proof, passed after the execution of the notes, may operate upon the case. It relates only to the remedy, authorizing the whole matter to be settled in one suit instead of two.

But such statute could not operate upon a note previously given, so as to cut off the equities of the maker, inasmuch as that would affect his *rights*.

This action was commenced by Payne, for the use of Clark, against Griffey, before a justice of the peace, on a note not negotiable, given by Griffey to Payne, and by him endorsed to Clark. It was afterwards brought into the District Court by appeal. From the bill of exceptions filed in this case, it appears that the note on which the suit was founded was executed as part consideration for a claim

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(*d*) Rev. § 1826. See also cases in note (*a*), *ante*, 62.

on the public lands, consisting of a part of three different tracts of public lands, sold by plaintiff Payne to defendant; that one of said tracts had on it, when sold, a small cabin; that the other two were wholly unimproved; that the last two were not the plaintiff's claim, but belonging to other persons at the time of the sale, and that defendant (Griffey) had not received the benefit of them; that the tract with the cabin on it was the plaintiff's rightful claim at the time of the sale; that the two tracts so lost were of much more value and worth more a great deal than the tract and cabin defendant obtained; that the whole consideration agreed on was two hundred and fifty dollars, one hundred and ninety-three of which had been paid by defendant; that defendant held plaintiff's agreement without seal, and without consideration expressed on the face of it, to warrant the claim as sold against all persons' claims; that defendant, on the trial, had rendered up said agreement to be cancelled, and prayed the Court to instruct the jury that, if they were satisfied that the consideration had failed to a greater amount than the balance unpaid, or that defendant had already paid for as much or more than he received, they, in that event, have a right to find for the defendant, under the statute allowing part failure of consideration to be pleaded, which instruction the Court refused. This is the alleged error on which a reversal is sought.

*Rorer, for plaintiff in error. *69

Browning, for defendant in error.

By the Court, Mason, Chief Justice.— The note on which this suit was brought, was given as part consideration for a "claim" on the lands of the United States, consisting of three separate tracts, sold by plaintiff below to defendant. The greater portion of the entire price had been paid. It appeared also, from the evidence, that the

plaintiff had no right to dispose of two of the tracts above mentioned. Under these circumstances the Court was asked to instruct the jury that if they were satisfied that the consideration had failed, to a greater amount than the balance due, or that the defendant had already paid for as much as he had received, they had a right to find for the defendant under the statute allowing part failure of consideration to be pleaded, which instruction was refused by the Court.

We think this refusal was erroneous. It is true, the plaintiff had warranted his "claim," title, or settler's right to the property sold, and in case of a breach of warranty, the English Courts, have generally held, that either the property must be restored, and the contract rescinded, or the purchase money paid and damages for the breach of warranty recovered in a cross action. The Courts in this country have, however, in many instances, discountenanced this circuity, and given a more direct remedy in cases of partial failure of consideration, arising as well from breach of warranty as otherwise. The case of Hills *v.* Bannister & Butler, 8 Cowen 31, is of this character, and other similar decisions in New York, as well as in the other states, evince a disposition to adopt what seems to us a more just and reasonable rule.

But further than this, our legislature has spoken on this subject with a design, as we think, to reach cases of this very kind, and to sanction the American decisions above referred to. It is true, this note was given before that statute was enacted, still, we see nothing to prevent its application here. It only modifies the *remedy* of the parties, without affecting their *rights*. It allows the whole matter to be settled at once, without the necessity of two actions to do justice on both sides.

It was contended in the argument, that the note having been transferred before it became due, the above defence could not be set up. It should be recollected, however,

that the note was not negotiable, and having been executed before the passage of our statute, rendering such instruments transferable in the same manner as inland bills of exchange *and with the same consequences *70 to all parties concerned, this statute does not operate upon the case. To permit it to do so, would be to affect the rights of the parties by a statute passed subsequently to the contract. The defendant can, therefore, set up the same defence against the assignee, as though the beneficial interest still remained in the original payee.

The judgment of the Court below will, therefore, be set aside, and a new trial ordered.

Enoch S. Hill *v.* John Smith and others.

Error to Henry.

A sealed note, given for improvements on the public lands, is not part of an illegal contract, and it is collectible (*e*).

It is competent for the legislature to render *illegality of consideration* no defence to an action on any contract.

The mere attaching a penalty to an act does not necessarily invalidate all contracts in relation to that act; the effect in that respect is not the same as though the act had, in express terms, been absolutely prohibited. Where the act is not intrinsically wrong, nor contrary to public policy, but a mere penalty affixed to it, the payment of this penalty satisfies the law, which reaches no further than that penalty (*f*).

(*e*) See Freeman *v.* Miller, *post*, 80; Stanard *v.* McCarty, *post*, 124; Zickafoose *v.* Heulick, *ib.* 175; Miller *v.* Webster, *post*, 312; Starr & Burgess *v.* Wilson, *post*, 438, cited and approved in Pierson *v.* David, 1 Iowa, 23; see also McCoy *v.* Hughes, 1 Gr. 370; Doolittle *v.* Bridgeman, *ib.* 265; Ellis *v.* Mosier, 2 Gr. 246.

(*f*) Marienthal, Lehman & Co. *v.* Shafer, 6 Iowa, 228; Davis *v.* Bronson, *ib.* 410; Guenther *v.* Dewein, 11 Iowa, 188; Sipe *v.* Finarty, 6 Iowa, 394; Craig *v.* Andrews, 7 Iowa, 17; David *v* Ransom, 1 Gr. 363;

Enoch S. Hill *v.* John Smith and others.

It is contrary to the spirit of our institutions to revive, without notice, a penal statute, grown obsolete by long disuse; especially when the general current of legislation shows the statute to have been regarded by the legislature as no longer in force. Custom can repeal a statute.

The facts are set forth in the opinion of the Court. The case was submitted without argument.

LEARNED, for plaintiff in error.

RICH, for defendant in error.

BY THE COURT, MASON, CHIEF JUSTICE.— This was an action of debt, brought upon a single bill or sealed note, of which the following is a copy:

*71 *"BURLINGTON, Jan. 23, 1837.

"$1,000. Twelve months after date I promise to pay to John Smith & Brothers, or order, one thousand dollars, for value received. Witness my hand and seal, as above written.

"E. S. HILL, [SEAL.]"

The defendant pleaded *non est factum*, with notice of special matter under the statute. By mutual consent, the cause was submitted to the Court below upon the following facts:

"1. It is admitted in evidence that the writing obligatory in the plaintiff's said declaration mentioned, was executed and delivered to the said plaintiff by the said defendant, according to the tenor thereof.

Cole *v.* Parker, 7 Iowa, 167; Reynolds *v.* Nichols & Co. 12 Iowa, 398; Dalter *v.* Laue & Guye, 13 Iowa, 538; Whitlock *v.* Workman & Co. 15 Iowa, 351; Smith *v.* Grable, 14 Iowa, 429; Davis *v.* Slater, 17 Iowa, 250; Warnibold *v.* Schlicting, 16 Iowa, 250; Dively *v.* The City of Cedar Falls, 21 Iowa, 565; Richmond *v.* Dubuque & Sioux City R. R. Co. *et al.* 26 Iowa, 191.

"2. It is admitted in evidence that the said firm of John Smith & Brothers existed at the time of the execution of the said writing obligatory, that Henry Smith, one member of said firm, is dead, and that the other members of said firm survive, by whom and for whose use this suit is prosecuted, as also appears of recod in said cause.

"3. It is admitted in evidence that the said writing obligatory, in the plaintiff's said declaration mentioned, was made and delivered to the said plaintiffs, by the said defendant, for the consideration money agreed to be paid by the defendant to the plaintiffs, for the purchase of a claim, or the possessory right to a certain tract or parcel of land, belonging to the United States of America, situated in Des Moines county, in the territory of Iowa, aforesaid, containing about three hundred acres, more or less, on which there were valuable improvements, and seventy-five acres or more of said tract enclosed with a fence.

"4. It is admitted in evidence that the said plaintiffs, at the time of making said writing obligatory, were, and ever since have been, non-residents of the territory of Iowa, and are residents of the city of St. Louis, in the state of Missouri."

The Court below rendered a judgment in favor of the plaintiffs, for $1,000 debt, and $63.83 damages, upon which the defendant brought his writ of error, to obtain a reversal of that judgment, and assigned the following errors:

"1. The said writing obligatory, in the plaintiff's said declaration mentioned, was given for a contract for the purchase of a claim to a tract of the United States lands, with the improvements thereon, in violation of the provisions of the several acts of Congress, upon that subject made and provided.

"2. The whole contract, for which the said writing obligatory was *given, is contrary to the laws of the *72 United States, and is, therefore, void."

The statute of Wisconsin, which was in full force here at

the time this instrument was executed, declares "that all contracts, promises, assumpsits or undertakings, either written or verbal, which shall hereafter be made in good faith, and without fraud, collusion or circumvention, for the sale, purchase, or payment of improvements made on the lands owned by the government of the United States, shall be deemed valid in law, or equity, and may be sued for and recovered as in other contracts." Laws of 1836, p. 23. If this statute is of any validity, it closes the door to all further controversy, in relation to this matter.

But this act is said to be of no force and effect, being in contravention of an existing paramount law of the United States. The law here referred to is the act of March 3, 1807, entitled "An act to prevent settlements being made on lands ceded to the United States until authorized by law." Admitting that this act altogether prohibits any settlement upon the public domain, and that it was in full force at the date of the instrument on which this suit was brought, we consider it by no means conclusive against the plaintiff's right to a recovery.

As a general rule, illegality in the consideration will prevent the enforcement of any contract, even though, as in the present case, it be under seal. This is a salutary principle, but who will contend that it is absolutely inflexible? Is it beyond the power of legislation to modify or abridge the rule, or even to abolish it altogether? Is it surrounded with all that sacred inviolability, which so justly attaches to a constitutional provision? Suppose the public welfare should require an innovation upon this rule, is it placed beyond the reach of legal enactments? We have never heard such an idea advanced, and we consider it entirely within the province of the legislature, when they deem it expedient, to render all notes, whether sealed or unsealed, collectible, whatever might have been the consideration therefor. What they could thus accomplish in the aggregate, they may certainly do in the detail. They

may, therefore, declare that a certain species of illegality in the consideration shall not so vitiate a written instrument, as to prevent a recovery thereon.

The act of 1836, has at least had this effect. If prior to that statute the sale of improvements on the public lands was an illegal consideration, the law has at least prevented the defendant from setting up that species of illegality for the purpose of defeating the plaintiff's action.

There were excellent reasons for such a legislative interposition. *At the time this law was passed *73 there were more than ten thousand inhabitants within the present limits of this territory (then a part of Wisconsin) residing on the lands of the United States, and daily dealing in what were denominated "claims," or the settler's rights to those lands. Public policy dictated that there should be some better sanction to enforce the observance of their contracts, than the bludgeon or the rifle. The legislature therefore declared, that such contracts should be under the peaceful sway of the civil magistrate, rather than that the whole country should be overwhelmed with the miseries of violence and anarchy. We believe that in so doing they were not only promoting the public welfare, but that they were acting entirely within their legitimate province, and that the law therefore, for this purpose, is valid and binding.

But does the act of 1807 prohibit the sale of improvements on public lands, in such a manner as to render all such contracts illegal? It provides "that if any person or persons shall, after the passing of this act, take possession of, or make a settlement on, any lands ceded or secured to the United States by any treaty made with a foreign nation, or by a cession from any state to the United States, which lands shall not have been previously sold, ceded, or leased by the United States, or the claim to which lands, by such person or persons, shall not have been previously recognized and confirmed by the United States; or if any

person or persons shall cause such lands to be thus occupied, taken possession of, or settled, or shall survey or attempt to survey, or cause to be surveyed any such lands, or designate any boundaries thereon by marking trees or otherwise, until thereto duly authorized by law, such offender or offenders shall forfeit all his or their right, title, or claim, if any he hath or they have, of whatsoever nature or kind the same shall or may be, to the lands aforesaid, which he or they shall have taken possesion of or settled, or caused to be occupied, taken possession of, or settled, or, which he or they shall have surveyed, or attempted to survey, or caused to be surveyed, the boundaries thereof, he or they shall have designated or caused to be designated by marking trees or otherwise. And it shall moreover be lawful for the president of the United States to direct the marshal or officer acting as marshal in the manner hereinafter directed, as also to take such other measures and to employ such military force as he may judge necessary and proper, to remove from lands ceded or secured to the United States, by treaty or cession as aforesaid, any person or persons who shall hereafter take possession of the same, or make or attempt to make a settlement *74 thereon, until thereunto *authorized by law. And every right, title, or claim, forfeited under this act, shall be taken and deemed to be vested in the United States, without any other or further proceedings."

The act then goes on to authorize persons who have previously settled on the public lands, to remain, upon complying with certain conditions therein prescribed, and concludes by declaring it lawful for the proper marshal, under the instructions of the president, to remove any person not thus authorized to remain. Three months notice is to be given prior to such removal, and any person found thereon after the expiration of that time, incurs thereby a penalty of $100 and is liable to imprisonment, at the discretion of the Court, for any term not exceeding six months. Laws U. S. vol. 4, page 118.

It will be observed that this statute does not in express terms prohibit the settlement and occupancy of the public lands, but merely declares that such trespasser shall forfeit his rights, &c., that the president shall have power to direct his removal, and that after that power has been exerted, and the requisite notice given, a further penalty is inflicted on the transgressor.

It may well be questioned, whether this law, if in full force, would invalidate a contract for the sale of improvements on public lands, even without the aid of our statute. We are not now inquiring whether such a sale would constitute a valid consideration, but whether, even if there had been in other respects a good and valuable consideration, the contract is, notwithstanding, so vitiated as to be rendered absolutely null and void. Upon this point many decisions will be found in the reports of almost every Court.

In the case of Fox *v.* Abel, 2 Conn. Rep. 548 it was decided that a note given on Sunday was void, because the statute of that state prohibited all secular business on that day. But in Massachusetts, where the law fixes a *penalty* for the transaction of such business on that day, such notes have been held valid.' Geer *v.* Putnam, 10 Mass. 312.

It has also been decided in England, that where a fair was held on Sunday the sales were not void, although there was a penalty on the party selling on that day. Comyns *v.* Boyer, Cro. Eliz. 485. And in the case of Gremore *v.* Le Clerc Bois Vallon, 2 Camp. 144, the Court held that a person unauthorized to practice as a surgeon, might maintain an action for services in that capacity, although by law such a person was liable to a penalty of five pounds per month for *performing those very services, *the* *75 *act containing no prohibitory clause.*"

The case of Wheeler *v.* Russel, 17 Mass. 257, has been particularly referred to by the counsel for the plaintiff in error. That was an action upon a promissory note, given

for shingles sold in contravention of the statute of that state. From the report of the case it would seem that, although the penalty of forfeiture was, by law of that state, attached to any sale of shingles which were not of statutory dimensions, or which had not been surveyed, the statute went further and absolutely prohibited such sale.

In the Springfield Bank *v.* Merrick *et al.* 14 Mass. 322, a note was declared void which had been given in violation of the statute of that state prohibiting any banking company from loaning or negotiating any notes of unincorporated banking companies, under a penalty of $1000. This may appear somewhat at variance with the general current of the authorities above quoted, but the reasons of that decision seem to have been drawn, in a very great degree, from the fact that the general intention of the statute was to prohibit the banks from loaning or dealing in the notes of unincorporated banking companies, that such traffic was contrary to the policy and object of the law, and the contract was, therefore, void for illegality.

The rule to be drawn from these cases therefore, appears to be, that where an act is absolutely prohibited by statute, or is contrary to public policy, all notes, &c., given in furtherance of that act, are null and void; but where the statute fixes a mere penalty, contracts in relation to matters which subject the maker to that penalty are not on that account invalidated. Where not intrinsically wrong, the individual is permitted to perform the act upon the payment of the penalty. This is a species of license money, exacted for the priviiege of doing a certain thing, but the act is not otherwise unlawful unless expressly declared so. This seems to correspond with the views of the great English commentator in relation to actions that are merely *mala prohibita.* 1 Black. Com. 57.

Applying this rule, therefore, to the present case, there is nothing in the sale of improvements on the public lands which, independant of the statute, should render the con-

tract void for illegality. He must be a bold man who would assert that the occupancy of the public lands, in the manner practiced in the settlement of this territory, was in itself contrary to good morals or public policy. At the worst, then, it is merely a case of *malum prohibitum*, an instance, moreover, wherein the law has not absolutely fobidden the act, but has merely attached a penalty
*to its performance. Subject to this penalty, any per- *76
son has the same right to occupy or traffic in the public lands, as though the statute of 1807 had not been passed. If that had been the case, the sale of improvements thereon should, at most, be regarded in the same light as the ordinary sale of property to which the vender had no title. This might constitute a defence where want of consideration would be sufficient, but where no fraud or deception had been practiced, would never render the instrument now before as invalid.

But the act of Congress of 1807, seems to have been intended merely to prevent the acquirement of title by occupancy, and to authorize the removal of intruders in those cases where public policy should require; but never to disturb the peaceable and industrious husbandman whose labor was adding so much to the public wealth, changing the barren wilderness into fertile fields, and calling into almost magic existence whole states and territories, whose prosperity and power are constantly adding so much to the strength and glory of the nation.

But even if that act was originally intended to prevent entirely all settlements on the public lands, and if, under such circumstances territorial legislation would have been wholly incompetent to render notes, &c., collectable, which had been given in furtherance of objects illegal under that statute, there is still another matter of serious importance to be considered. Is that law for these purposes still in operation?

The act in question was passed 1807, and it is a matter

of public history that since that period it has never been exercised to prevent the ordinary settlement of the public lands. The cases wherein the president has availed himself of the powers therein conferred, have all been special, as where trespassers were committing waste without the design of making a settlement, or otherwise enhancing the value of the land. Nay, so far from discountenancing such settlements, special encouragements thereto have been offered. In numerous intances rewards have been conferred by acts of Congress on those who had taken possession of, cultivated, and trafficked in the public domain. The many pre-emption laws which have been passed from time to time have given all recompense to those who had settled upon and improved those lands. Some of these, too, have recognized the validity of contracts previously made, between landlords and tenants, which would have been equally void for illegality as any other contracts growing out of these alleged trespasses.

But further than this, governments have been organized by acts of Congress for the express benefit of a com-
*77 munity of criminals (agreeably *to the notions of the counsel for the plaintiff in error), the effect and evident intention of which was to encourage and facilitate their *illicit* conduct and purposes. It is notorious, that when this territory was organized not one foot of its soil had ever been sold by the United States, and but a small portion of it (the half-breed tract) was individual property. Were we a community of trespassers, or were we to be regarded rather as occupying and improving the lands of the government by the invitation and for the benefit of the owner? Were we organized as a colony of malefactors, or shall we not rather absolve the federal government from the charge of such stupendous folly and wanton wickedness?

Let us suppose that the next week after our territorial organization the president had directed the marshal to re-

move, with the least possible delay, the whole of our twenty five thousand people (excepting the few settlers on the half-breed lands and the still fewer who would have been entitled to remain by virtue of pre-emption privileges), ought such a command to have been obeyed? We do not ask what would have been the determination of our settlers, but what would the strictest duty have demanded of them? We have no hesitation in saying that such a command would have been altogether illegal, and ought not to have been obeyed.

To make this appear still more evident, let us further suppose that, the requisite notice to quit having been given and disobeyed, the offenders were brought before the proper Courts for trial. To say nothing of the utter impracticability of executing such a law, would the Courts be justified in giving it efficacy? If jurors could be obtained who would find the accused guilty, should the judge proceed to pass sentence? If so, the great mass of our citizens must be liable to be fined $100 each, and might, in addition, be hurried off to prison for the period of six months. And for what? For violating a law of which the great majority knew not the existence,—a law which had lain unexerted for such a purpose during more than thirty years, and ever since its enactment? Would this be in accordance with the intentions of the legislature? If so, the law was intended as a snare. Allurements of the most enticing kind were freely employed to decoy the unsuspecting and the innocent within its reach. Its position and character were concealed by the dust and rubbish of a third of a century; the broad and beaten path of custom leading directly across it had obliterated every apparent vestige of its existence. Suddenly, and when thousands are within its reach, the net is sprung and they are enfolded in its treacherous toils. *Whole *78 communities of unoffending citizens find themselves liable to heavy amercements and long incarceration for

doing acts which they had every reason to believe would be deemed patriotic and praiseworthy; for leading the way in the introduction of wealth, and civilization, and happiness, into the almost illimitable west; for sacrificing the comforts and endearments of home, and enduring the hardships and privations, and encountering the diseases of a new and untried country; for building up great communities in the wilderness, enlarging our bounds of empire, and vastly augmenting the current of our national revenue. For doing these acts which have redounded so much to the national advantage — done, too, in accordance with the almost express invitation of the national legislature, and when encouragement to western immigration had become a part of our settled national policy, these individuals, where they had every reason to expect rewards — nay, while on the one hand they are actually receiving such rewards, they feel themselves on the other condemned to severe and even ignominious punishment. Does the spirit of our institutions justify such stupendous deception and wholesale tyranny? We answer, emphatically, NO!

History furnishes us with a parallel example, and one which it may be profitable to contemplate for a moment. Henry the VII., of England, in order to replenish his treasury, had recourse to a measure which (in order that the plaintiff in error should succeed) must be legitimate here. Availing himself of the services of two judges — the supple instruments of his tyranny — he caused a general system of prosecutions to be instituted upon penal statutes which had never been repealed, but which, by long disuse, had become forgotten and wholly disregarded. Empson & Dudley, when afterwards brought to trial for their share in these transactions, pleaded "that it belonged not to them who were instruments in the hands of supreme power to determine what laws were recent or obsolete, expedient or hurtful, since they were all alike valid so long

as they remained unrepealed by the legislature." Hume's History of England. But this plea neither availed them with their judges nor with posterity. They were consigned to dishonored graves, and their memories have ever since been coupled with judicial infamy.

It is true, that public opinion would frequently be a very unsafe guide for a judicial decision. The fluctuating feelings of the multitude frequently operated upon by momentary excitement, by prejudice or by caprice, would very improperly be adopted as the standard of truth or sound reason. But where the same opinions are concurred in for centuries, and after passion and prejudice have wholly subsided, such *opinions are always founded *79 in truth and justice, and can more safely be followed than those of the most learned and able judges.

Fortified by this authority, we pronounce it contrary to the spirit of that Anglo-Saxon liberty which we inherit, to revive, without notice, an obsolete statute, one in relation to which long disuse and a contrary policy had induced a reasonable belief that it was no longer in force. If custom can make laws, it can, when long acquiesced in, recognized and countenanced by the sovereign power, also repeal them. Such has been the case in the example now before us. We feel, therefore, justified in declaring that the act of March 3, 1807, so far as it would have gone to authorize the removal of the inhabitants of this territory, or their punishment as criminals, is wholly inoperative and void; that it has been repealed by long *non user*; by the enactment of other and irreconcilable statutes; by the establishment of an opposite policy, and by the legislative recognition of wide-spread and long-established customs among the people of the west, which are wholly incompatible with such an operation of this statute. If this measure can be sanctioned, then is there nothing to prevent Congress from laying these snares by premeditation, and beguiling the unwary by thousands with the express de-

sign of filling the coffers of the public treasury, thus introducing into this republic a practice which forms one of the darkest stains on the character of one of the most arbitrary and unscrupulous of English tyrants. Courts of justice can never become accomplices in such a project.

We have thus given our views at length in relation to this subject. From the fact that the cause was submitted without argument upon a mere reference to authorities, we may not have met satisfactorily all the views which the counsel for the plaintiff in error would have taken of the case, but we can conceive of no course of reasoning which would have justified a different decision.

The judgment below will, therefore, be affirmed.

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*80 *FREEMAN *v.* HOLLIDAY.

Error to Muscatine.

The sale of an improvement on public lands is a valuable consideration for a promissory note, independent of statute (*g*).

The transfer of an absolute property is not necessary to constitute a valuable consideration. The acquisition of a probable, customary advantage is sufficient for this purpose.

This was an action of debt, brought upon the following instrument:

"AUGUST, the 13th day, 1836.

"Nineteen months after date I promise to pay Samuel Holliday, or order, the just and full sum of one hundred dollars, for value received of him, this the day and date above mentioned.

"(Signed) WALTER FREEMAN."

(*g*). See note (*e*) *ante*, p. 70.

It appeared on the trial that this note was given for the sale of an improvement on public lands, and previous to the statute making such a consideration valid. The question, therefore, was raised, whether, independent of statute, this would form a valuable consideration.

Grant, for plaintiff in error, cited, Bell *v.* Pierson, decided in this Court; Act of Congress, March 3, 1807; 3 Blackstone, 18 and 19; 1 Blackford Rep. 19, 20, 21; Pamphlet Reports of the Supreme Court of Illinois, 78, 117, and 294; Laws of Illinois, 420, and Laws of Wisconsin and Iowa, in relation to improvements on the public lands.

Lowe, for defendant in error.

By the Court, Mason, Chief Justice. — This was an action on a promissory note. The error alleged is, that the Court refused to instruct the jury, that if they believed the note in controversy was given prior to October, 1836, in consideration of a valuable improvement on the public lands of the United States, that such improvement is not a good consideration for said note. The whole question is as to whether the sale of an improvement on the public lands does, independent of statute, constitute a legal consideration.

The consideration of a promissory note is always deemed sufficient, whenever, in consequence of the contract, the maker has derived a benefit *or the payee suf- *81
fered detriment. The case of a purchaser of lands belonging to the United States who executes a promissory note for improvements previously made thereon, is in neither of these predicaments. The title to the improvements would have vested in the purchaser previously to the execution of the note. No benefit would accrue to him or detriment to the payee in consequence of the con-

tract for the improvements. The cases cited from the reports of Indiana and Illinois are of this character, and are clearly correct.

But the case at bar is different from these. The purchaser of the improvements was not previously the owner of the freehold, and consequently was not, as in those cases purchasing his own property. If he acquired anything by the purchase, there was a sufficient consideration.

The owner of the freehold is also the owner of all improvements made thereon. As against the United States, therefore, the seller in this case had no rights which he could enforce. It does not follow, however, that he had no valuable transferable interest. The physician or the school-master who sells out what is termed his good-will, sells nothing to which he has an absolute right. The purchaser in that case cannot compel the patrons of his predecessor to employ *him*. Still, the probabilities are in his favor. By making the purchase and removing the former incumbent out of the way, his chances of success are increased, to what extent he must be the judge. For the estimated value of his new acquisition, he executes his promissory note. It can doubtless be collected. The transfer of an absolute property is not therefore necessary to constitute a valuable consideration. The acquisition of a probable customary advantage is sufficient for this purpose.

We think such was the case in regard to the sale of improvements on public lands. These constituted our only titles at the date of the note on which this suit was brought. These titles secured to the possessor the undisturbed possession of the land until the fee simple was acquired from the United States. This has been one of our general customs, coeval with our political existence, co-extensive with our territorial limits, one therefore which the Courts may lawfully recognize. The purchaser knew what

he was buying, supposed he could derive advantages from the purchase equivalent to the price to be paid, and gave his note for the amount. We think in honor, in equity, and in law, he is bound to pay it.

As to the *illegality* of the consideration contended for by the plaintiff in error, the state of the pleadings does not seem to be such as to *let in this defence *82 were it valid.* The case of Hill *v.* Smith, however, decided at this term of the Court, settles that question, so far as the decision of this Court can go, in favor of the legality of the consideration. We entertain no doubts of the correctness of that decision.

The judgment of the Court below will, therefore, be affirmed.

*The pleas in this case were *nil debet*, want of consideration, and failure of consideration. There was no plea of illegality.

Holmes, Brown & Co. *v.* Mallett.

Error to Lee.

Where a note was executed in Illinois by a minor, who sets up the defence of infancy on the trial, it is not necessary for him to prove that by the laws of Illinois, minors are not liable on their general contracts.

Exemption from liability in such cases is a part of the common law.

Immigrants bring with them the common law of the parent country.

The Courts will judicially take notice of matters of general history.

They will not require proof to show that Illinois was settled from countries where the common law prevails (*h*).

(*h*) The ordinance of 1787, for the government of the north-west territory, of which Illinois formed a part, made the common-law the law of that country. See Art. 2 of said act, page 930, Rev. of 1860. No presumptions therefore need be indulged that the common law obtained in that state.

Holmes, Brown & Co. *v.* Mallett.

The suit was brought on a promissory note executed in Illinois by the defendant, then a minor. The case was submitted to the Court. The defendant resorted to infancy as a defence, and in this was sustained by the Court, notwithstanding the laws of Illinois in relation to the liability of minors on their contracts was not proved.

BY THE COURT, MASON, CHIEF JUSTICE.— This action was brought on a promissory note executed in the state of Illinois by the defendant, then a minor. In the Court below the right of a trial by jury was waived, and the case submitted to the Court. The plaintiff's counsel moved for judgment.

1. Because the defendant ought to have proved that by the laws of Illinois he would have been discharged from the payment of the note.

2. Because the contract being merely voidable, the defendant should have disaffirmed the same within a reasonable time after he became of *age. Both these mo-
*83 tions were overruled by the Court and judgment rendered for the defendant.

The main question is as to the necessity of proving the laws of Illinois, in order that the defendant may under them claim exemption from liability on his note. The cases cited are not directly in point. The two most nearly parallel are that of Male *v.* Roberts, referred to in Comyn on Contracts, p. 626, and that of Thompson *v.* Ketchum, 8 Johnson's Reports, 189. The former was a suit instituted in England, on a note executed by an infant in Scotland. The latter was on a note given in Jamaica and sued in the state of New York. In both of the above cases it was deemed necessary for the defendants to prove the *lex loci* in order to derive the benefit thereof; upon the ground that the Court could not declare that by the laws of the foreign state where the notes were executed, infancy was a bar to actions thereon. We think the present case very different from these.

That infancy would be a valid defence to an action on an ordinary promissory note executed in this territory, no one has ever doubted, and yet where do we find any statute law to that effect. We have searched the acts of our territorial legislature, and can find none. It is common law derived from difierent sources, if not from the principle that emigrants carry with them the common law of the country from which they emigrated, at least from the ordinance of 1787, through the medium of the organic acts of Wisconsin and Iowa. In whichever of these modes the law finds its way here, it has also been introduced into Illinois, and in such a manner that our Courts can judicially take notice thereof.

The ordinance of 1787 is made part of the fundamental law of this territory. At the time of its passage the common law not only of England, but of all the states of the Union declared infancy to be a valid defence to actions on contracts of this nature. That ordinance seems to contemplate the extension (in a general way) of all the benefits of the common law to the territory northwest of the Ohio river, including the state of Illinois. This Court can therefore legally know to some extent what is the law of Illinois in this particular.

But independently of the ordinance of 1787, we should feel justified in coming to the same conclusion. Matters of national history are recognized by Courts of justice. That the United States were originally colonized from England; and Illinois from those colonies or the states formed from them, are matters which need not be pleaded or proved. That emigrants carry with them the common law of the mother country is also well settled law. Between England and Scotland, or New York *and Jamaica, the cir- *84
cumstances were entirely different. The cases above cited, therefore, do not form precedents which should govern us here.

The other point is of less importance. The infant who

executes a promissory note is not bound to disaffirm the contract until he is called on for the money. In order to bind himself he must do some act in affirmance, after he becomes of age.

The judgment of the Court below will, therefore, be affirmed.

STRANG *v.* WILSON.

Error to Des Moines.

The payee of a promissory note given originally without a valuable consideration, is a competent witness in a suit by the endorsee against the maker to prove that the plaintiff paid full consideration for the note, and that it was endorsed before maturity (*i*).

The endorser, when not interested, is competent to prove facts arising after the execution of the note, but not to prove as to original liability of the maker.

The action was assumpsit upon a promissory note given by Strang to Smith, and by him endorsed by Wilson. The bill of exceptions sets forth that "the defendant having notified the plaintiff that on the trial he would be required to prove that the note on which the suit was instituted had been obtained for a valuable consideration, and the defendant having introduced testimony to show that said note

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(*i*) The common-law rules of evidence which excluded parties and persons having a direct pecuniary interest in the matter in issue, are so modified as to admit all such, except where the adverse party is an executor, where the facts to be proved transpired before the death of the deceased person, and in proceedings in relation to the settlement of estates of deceased persons, infants, or persons of unsound mind. The interest of a witness no longer goes to his exclusion, but to his credibility. See Rev. §§, 3978, 3979, 3980, 3981, 3982.

was given for unimproved lands belonging to the United States, the plaintiff offered to prove by Jeremiah Smith, the payee and endorser of the note, that the same was endorsed by the plaintiff before maturity and for a good and valuable consideration; to which testimony the defendant objected, and the objections overruled by the Court. Whereupon, defendant excepted, &c."

The introduction of this witness was the only point relied upon for error.

GRIMES, for plaintiff in error.

BROWNING, for defendant.

*85 *BY THE COURT, MASON, CHIEF JUSTICE. — The suit in the Court below was brought on a promissory note given by Strang to one J. Smith, or order, for unimproved lands belonging to the United States, and endorsed to the plaintiff below. The latter having been notified that on the trial he would be required to show that he had paid a valuable consideration for said note, and it having been proved on the trial that there was a total want of legal consideration, as between the original parties to the note, the defendant in error was required to show that he obtained the note for a good and valuable consideration, before the same became due. To prove these facts, Smith, the payee of the note, was offered as a witness. He was objected to as incompetent, but the objection was overruled, to which decision exception was taken at the time, and the case brought up here by a writ of error for reversal.

The only inquiry is as to Smith's competency. It has been universally decided, that the endorser of a promissory note is a competent witness for some purposes, but incompetent for others. As to what particular facts he is or is not a competent witness, we find some discrepancy in the decisions of different Courts. In 1 Massachusetts Reports, 78, it was decided that he was incompetent to prove the

handwriting of the maker without a release; and in Rice *v.* Stearns, 3 Mass. 225, he was declared competent for this purpose if the endorsement had been been made "without recourse." The New York Courts have decided that he is not competent to prove the original contract usurious. In 15 Johnson's Reports, 240, and again, 16 Johnson, 201, it was decided that he was incompetent to prove the signature even where the endorsement was "*without recourse*," upon the ground that his endorsement in this manner would not protect him if the original signature had been forged. It has also been decided in the same Court that he was not competent to prove a promise by the maker within six years, for the purpose of avoiding the statute of limitations. Baskins *v.* Wilson, 6 Cowen, 471.

There is some discrepancy in the cases above referred to, but none of them are at variance with the rule that the endorser is not a competent witness to prove or to disprove the legal obligation of the maker to pay the note, independent of the rights of an innocent purchaser. This rule has, however, in New York, become very much relaxed in favor of enlarging the competency of the endorser as a witness. In Stafford *v.* Rice, 5 Cowen, 23, it was decided that the endorser was competent to prove the note void in its inception for usury. A decision similar in principle was also made in the case of the Utica Bank *v.* Hilliard, 5 Cowen, 153, and in Jackson *v.* Peckard, 6 Wendell, 415.

*86 *It will be observed that the strictest of these decisions only go to declare the endorser incompetent to establish or disprove the maker's original liability on the note. We have seen none that go to establish a more rigid rule on this subject. On the other hand, Courts have generally been of the opinion that, unless interested in the event of the suit. the endorser was competent to prove facts subsequent to the due execution of the note,* and

*Motives of public policy, even where there is no interest, prevent a party to a negotiable instrument from giving testimony to invalidate

which go to destroy the title of the holder; and his admissibility would seem to be still more evident if called to sustain that title. This was the decision in Woodhull *v.* Holmes, 10 Johnson, 231, and in Skilding and others *v.* Warren, 15 Johnson, 270. In the case of Baker *v.* Arnold, 1 Caine, 258 (cited in Starkie on Evidence, 179, note *a*), it was decided that the endorser was competent to prove that the note was assigned after it became due, and we see no reason which would in that case have prevented him from swearing that the assignment took place previous to the maturity of the note, if such had been the fact.

But aside from precedent and authority, what principle of reason would have prevented Smith from testifying in this case? Admitting (what is stated in the bill of exceptions) that the note was given for no consideration, if Wilson recovers against Strang, the latter will have a legal right to recover the whole amount of the note and interest from Smith. If he fails in a recovery against Strang, he himself has his recourse against Smith for the same amount. Should it appear, therefore, that the note was assigned before maturity, Smith will be liable to Strang if after that time he is liable to Wilson. His interest is, therefore, as between these parties, equally balanced, and this renders him competent.

In reply to this, however, it has been urged for the plaintiff in error, that the note was given as part of an illegal contract, and, consequently, that if Wilson should recover in the present case, Strang would be remediless; whereas, if Wilson should fail here, *his* remedy would be good against Smith, and that Smith, therefore, has an interest in the success of the plaintiff below. To this it will be a

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that instrument, because every man who is a party to an instrument gives a credit to it, and he is, therefore, stopped from giving evidence to invalidate it. 1 M'Nally's evidence, 123. This is the reason why the rule, as above laid down, is limited to *facts subsequent to the due execution of the note.* — [Note by Judge MASON.]

sufficent answer, so far as we are concerned, to re-
*87 fer to the decision in the case of Hill *v.* Smith, made at the present term of this Court, where it was decided that such contracts were not illegal.

The judgment below will, therefore, be affirmed.

Smith *v.* Ralston.

Error to Des Moines.

On notes and inland bills of exchange, it is not necessary that the presentation and notice of non-payment should be made by a notary, in order to charge the endorser (*j*).

Where several promissory notes are declared on, in different counts of the same declaration, it is no ground of error that the jury rendered a general verdict, without specifying on which of the counts it was rendered.

The statement of the facts of this case is sufficiently set forth in the opinion of the Court.

Browning, for plaintiff in error.

Roker, for defendant.

By the Court, Mason, Chief Justice.—This was an action brought by the defendant against the plaintiff in error, on three promissory notes, on which the said plaintiff was sued as endorser. The principal error complained of, however, as designated in the bill of exceptions, relates to but one of these notes. This was drawn at Milwaukee, where the drawer resides, and endorsed by Smith to Ralston. To the introduction of this note, the counsel for the

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(*j*) To the same effect is Merritt *v.* Woodbury & Dawley, 14 Iowa, 299; citing Story on Prom. notes, § 341.

defendant below objected, because there was no notarial protest for non-payment introduced to the jury. This objection was overruled by the Court, on the ground that no protest or notarial certificate of presentment and non-payment was necessary in cases of promissory notes, but that these might be presented by any person other than a Notary Public, and due notice of the non-payment thereof would be sufficient to charge the endorser, and that these facts might be proved by ordinary witnesses. From an examination of all the authorities referred to by the counsel for the plaintiff *in error, which could *88 conveniently be consulted, we find nothing to convince us of any error in this respect in the Court below. On the contrary, one of those authorities, 3 Pickering, 415, is a direct sanction to the decision below. It was decided in that case that the agency of a notary public in the presentment of promissory notes, and giving notice of non-payment, was unnecessary.

On notes and inland bills of exchange, it is only necessary (in order to charge the endorser) that they should be presented for payment, and notice for non-payment duly given. Chitty on Bills, 465. This is the evident dictate of reason and expediency, for, otherwise, as the law has heretofore been, the endorsee of a note, however small in amount, must relinquish all claim upon the endorser, or else call in the assistance of a notary public, however distant, to perform an act which could be equally well performed by himself, in the presence of his next neighbor.

The only other error assigned is, that the jury rendered a general verdict upon the declaration, without stating upon which of the several counts said verdict was rendered. As no authorities have been cited on this point, we shall only say that the want of such specification does not render the proceedings erroneous.

Judgment affirmed.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF IOWA.

JULY TERM, 1841.

HON. CHARLES MASON, CHIEF JUSTICE.
" JOSEPH WILLIAMS, } ASSOCIATE JUDGES.
" THOMAS S. WILSON, }

JONH F. HELMICH *v.* ADAM JOHNSON.

Error to Des Moines.

The District Courts have a common law jurisdiction over inferior tribunals, which may be enforced by writ of *certiorari* (*a*).

A justice of the peace has no right to set aside the verdict of a jury and grant a new trial (*b*).

Where there has been a *trial*, an application to set aside the judgment is unnecessary in order to entitle the party to an appeal.

This was originally an action for the trial of the right of property before a justice of the peace. After a full trial and verdict for Helmich, the justice of the peace granted a

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(*a*) The supervisory jurisdiction of the District and Circuit Courts over inferior tribunals is regulated by statute. Rev. chap. 140.

(*b*) To the same effect is Dupont *v.* Downing, 6 Iowa, 172. Nor can a justice entertain a motion in arrest of judgment. See Rev. § 3393; Rhodes *v.* De Bow, 5 Iowa, 260.

new trial, whereupon, without going into the second trial, the counsel of Helmich sued out a writ of *certiorari* and removed the whole proceedings before the District Court of the county. This was done in pursuance of an order of the District Judge upon a regular application being made to him for that purpose.

*A motion was made in the District Court to dismiss *90
the proceedings for want of jurisdiction, such a case not having been presented as to authorize the granting of a writ of *certiorari* in pursuance of the statute. The counsel for Helmich contended that this was a common law writ, to be issued for purposes of this nature without any authority from statute law, but the Court being of a contrary opinion sustained the motion to dismiss. A writ of error was thereupon brought in order to test that question.

LEARNED, for plaintiff in error.

ROBER, for defendant in error.

BY THE COURT, WILSON, CHIEF JUSTICE. — We think that the writ of *certiorari* is a common law writ, and that the District Courts of this territory possess a common law jurisdiction, and a supervisory control over all the inferior jurisdictions within the territory. That in the absence of any statute giving such authority, the District Courts, upon proper applications, can direct writs of *certiorari* to be awarded, to bring before such Courts causes pending before the justices of the peace, and that the District Court erred in dismissing the writ, and not examining the record of the magistrate's proceedings.

It is not *absolutely* necessary that the Supreme Court should examine the record of the magistrate's proceedings and give an opinion upon any of the matters set forth in the petition as errors of the magistrate, or say what judgment the District Court should give, whether it should pro-

ceed to render such judgment as the magistrate should have rendered, or only affirm the proceedings if found to be regular, and quash them if found to be irregular. It will be the province of the District Court, to determine these matters. There are, however, in the case two points, the immediate decision of which, would it is alleged, settle two important questions of practice. The questions are:

First: Whether under the statute, a justice of the peace has a right to set aside the verdict of a jury, and grant a new trial?

Secondly: Whether previous to taking an appeal from the judgment of justices, it is necessary that there should be, in all cases, an application to set the judgment aside, and a refusal to grant the application?

The statute allowing appeals is not very plain, and the doubts, if any exist, have arisen from a want of care in wording the statute. We are *of the opinion that *91 a justice of the peace has no authority to set aside the verdict of a jury, and that those parts of sections 2d and 3d, article 9th of the act prescribing the duties, powers, and regulating the proceedings of justices of the peace, approved Jan. 21, 1839, which refer to applications to set aside judgments, apply merely to judgments by default, and not to judgments rendered upon the verdict of a jury. If the statute should be construed, as authorizing magistrates to award new trials after the finding of a jury, it would lead to endless confusion and litigation; for if a magistrate can, under this statute, allow one new trial he can allow an infinite number, and by so doing, might deprive the party desiring to appeal for years from that privilege.

The third section explains the second. It expressly authorizes an appeal upon condition that the party aggrieved, shall withiu a limited time enter into recognizance, &c. This section does not require an application to be made to set the judgment aside, except in cases where it has been rendered by default.

The judgment of the District Court, in dismissing the writ of *certiorari*,, is reversed, and the cause is remanded to that tribunal that such proceedings may be had as justice may require.

Alexander Levi *v.* Thomas McCraney.

Error to Dubuque.

Where the suit is brought by the endorsee and legal holder of a promisory note against the maker, and a verdict is rendered for the defendant on the merits, this will be a bar to a subsequent suit by the payee (*c*).

Strict nicety of pleading is not required in justices courts. No regular plea is necessary (*d*).

In such cases where it appears that issue was made up in the District Court, without setting forth what the precise issue was, it will be presumed here that the issue was such as to try the real merits of the case.

The suit was originally brought before a justice of the peace, on a promissory note given by McCraney to Levi, and by him endorsed to Martin. There was no evidence that any plea at all was filed before the justice, but the parties appeared and went to trial, and judgment was rendered for the plaintiff. The cause was then brought
*92 into the *District Court by appeal, and issue was there made up, but it does not appear what that issue was.

(*c*) See the following cases: Harlin *v.* Berry, 4 Gr. 212; Delany *v.* Reade, 4 Iowa, 292; Davis *v.* Milburn, *ib.* 246; Mc Namee *v.* Moreland *et al.* 26 Iowa, 96.

(*d*) Neil *v.* Neil, *post*, 491; 4 Gr. 310; 2 Gr. 191, 350; 3 Gr. 111; Hall *v.* Monahan, 1 Iowa, 554; Stone *v.* Murphy, 2 Iowa, 35; Sears *v.* Tubbs, 4 Gr. 409; Greff *v.* Blake, 15 Iowa, 222; Smith *v.* Humphrey, 15 *ib.* 428; Emerick *v.* Clemens, 26 *ib.* 382.

Alexander Levi v. Thomas McCraney.

On the trial in the District Court, the defendant offered in evidence the record of a previous trial on the same note, at the suit of Martin against the said defendant, in which a verdict had been rendered "for the defendant"—"that a judgment was rendered up on the finding of the jury by the said justice in favor of the defendant; and to prove by said transcript, as also by the testimony of the said justice, the identity of the note, which testimony was objected to, because the said transcript did not show a judgment between the same parties, but between the said defendant and a different plaintiff, which objection was overruled, and the defendant thereupon proceeded to show by the transcript of the magistrate that there was a former judgment in a suit upon said note in a case in which T. O. Martin was plaintiff, and said McCraney defendant, and also to prove by P. S. Dade, the magistrate before whom both causes were tried, that the note was the same."

It appears, also, from the bill of exceptions that instructions were given to the jury similar in effect to the views expressed during the trial as above set forth, to all which exceptions were taken, and a writ of error taken to reverse the judgment.

Berry, for plaintiff in error.

Crawford, for defendant in error.

By the Court, Mason, Chief Justice.—This action was brought on a promissory note given by defendant to plaintiff. On the trial below, the defendant offered to prove that a former suit had been instituted on the same note, by one T. O. Martin, in which there had been a verdict for the defendant. This evidence was admitted by the Court, which is the basis of all the errors assigned in this case.

On the trial in this Court, a written agreement was filed by counsel, by which it was mutually admitted that Martin

at the time he instituted the first suit above mentioned, was the assignee and legal owner of the note. In that case the finding of the jury on the merits, would have been a bar to a second suit on the same note. If such were not the case, there is hardly any limit to the extent to which a defendant might be unjustly harrassed. A verdict for the defendant on the merits is of the same effect in this respect, as a judgment for the plaintiff after it has been paid off and satisfied.

It is contended, however, by the plaintiff in error,
*93 that this trial at *the suit of Martin was not a trial on the merits, but that a mere judgment of non-suit was rendered. We understand the transcript differently. It states that the whole matter was submitted to the jury, who found a verdict *for the defendant.* This will be presumed to have been upon the merits, where nothing appears to the contrary.

Again, it is said that there is no evidence that the plea of a former recovery was put in before the justice, in the second suit. We do not think this was necessary. To require strict nicety of pleading in those Courts, would be incompatible with the objects for which they were organized. The statute does not require a written declaration. Even a verbal statement is not requisite, unless called for by the justice. Why then should a plea be necessary?

Without observing all the formalities required in Courts of record, the parties appear before the justice of the peace, the plaintiff proves his cause of action, and the defendant sets up and proves any legal defence which he may have thereto.

But the transcript of the proceedings in the District Court, shows that issue was there made up. What that issue was, does not appear. Under such circumstances, and inasmuch also as no objection seems to have been there taken to the introduction of the proof of a former recovery, on account of the same not having been pleaded, it will be

fair to presume that such an issue was made up as would try the true merits of the case.

We also think the instructions to the jury were correct, for reasons already given above.

The judgment below will, therefore, be affirmed.

Jasper Koons *v.* John Dyer.

Error to Louisa.

The District Courts of this territory have jurisdiction of cases where the amount in controversy is less than fifty dollars.

Action, *assumpsit.* The plaintiff claimed by his declaration $146, but failing to prove one of the items, amounting to $100, defendant moved for a non-suit, on the ground that the amount to be recovered being less than $50, the District Court had no jurisdiction of the matter. *This motion being sustained by the Court, the *94 plaintiff excepted and brought the cause up by writ of error.

Thomas, for plaintiff in error.

Whicher, for defendant in error.

By the Court, Mason, Chief Justice.—We think the District Court erred in granting the nonsuit. Although justices of the peace have jurisdiction of suits for less than fifty dollars, we know of no law which deprives the District Courts of the jurisdiction of that class of cases. However desirable some restriction of this kind may be, the Courts cannot fix one. The District Court is a Court of general jurisdiction. To remove any class of cases out

of such jurisdiction requires legislative action. Something more too, than merely conferring jurisdiction upon another Court. As the law now stands the District Court has concurrent jurisdiction with justices of the peace, for all sums of fifty dollars and under and exclusive jurisdiction for all sums over that amount. The nonsuit granted in this case will therefore be set aside, and a writ of *procedendo* awarded to the District Court.

Mark Hudson *v.* R. & O. Matthews.

Error to Jefferson.

Where a declaration contains a count on a promissory note, and also other counts, and it appears that the cause of action had not accrued on the note at the time suit was brought, the Court will not presume the verdict to have been rendered on the count upon the note (*e*).

The *lex mercatoria*, allowing three days grace on notes, bills, &c., is in force here until a contrary custom be established.

An action of debt was brought by R. & O. Matthews against Hudson, in the District Court of Jefferson county. The declaration contained several counts, and among them one upon a promissory note for *six dollars and seventy-seven* cents. The note was dated the fifth day of February, 1840, payable one day after date. Suit was brought on the eighth day of the same month. A verdict was obtained for
*95 *six dollars* **and seventy-seven* cents. There was nothing in the record, except the amounts being equal,

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(*e*) By the statute, "grace is allowed on bills and notes executed or payable within this state, according to the principles of the law merchant." Rev. § 1813; Edgar *v.* Greer *et al.* 8 Iowa, 394.

to show that the verdict was on the note. There was nothing in the record to show a tender, except a plea of tender.

The following errors were assigned:

1. By the law of the land and the customs of the country in regard to bills of exchange and promissory notes, the plaintiff's right of action did not accrue upon the said promissory note, for which the verdict and judgment in this case was rendered, until the three days of grace had expired, after the said note was payable, which, in this, case would not have been until the tenth day of February, 1840; whereas, suit was instituted on the same on the 8th day of the same month.

2. The District Court had no original jurisdiction to render judgment upon a note for the sum of six dollars and seventy-seven cents, and this cause being an original cause in that Court, and the jury finding for the defendant for all the other demands declared on.

3. The amount of the said note having been tendered and brought into Court, the verdict of the jury should have been for the defendant, generally, and the said judgment ought to have been arrested and set aside.

4. The judgment of the said Court awarded full costs against the plaintiff in error.

Learned & Shuffleton, for plaintiff in error.

Rich, for defendant in error.

By the Court, Wilson, Justice.— The first and third errors set forth in the plaintiff's assignment are not presented by the record of the proceedings in the Court below. The declaration contains some of the common counts in assumpsit, and also a special count upon a promissory note, but it does not appear that the finding of the jury was upon that count. The verdict was general, and as follows; viz: "We, the jury, find in favor of the plaintiff, and assess the damages at $6.77. There is nothing upon

the record which shows that the note was given in evidence to the jury, or that the common counts in the declaration were unsupported by testimony. Can the Court presume this? We think that such a presumption would be a violent one; that if the Court ought to presume anything, it would be in favor of the legality of the proceedings. When a party seeks to reverse a judgment he should show affirmatively that there was error.

It does not appear from the record that the amount
*96 of the note *was tendered and brought into Court, and it is unnecessary to say what the Court should have decided upon that state of facts.

The second point has been settled by the Court at this term, in the case of Koons *v.* Dyer. The District Court has, under our present laws, concurrent jurisdiction with justices of the peace, where the amount of controversy is less than fifty dollors.

The fourth point is settled by the decision of the second, for if the District Courts have concurrent jurisdiction with justices of the peace, in cases where the demand is less than fifty dollars, it follows, as a matter of course, that where the party recovers any amount, however small, he is entitled to cost. As the record does not present any erroneous proceedings in the Court below, the judgment of that Court must be affirmed.

As the decisions of the questions presented by the plaintiff's first assignment of errors might tend to prevent, in some measure, future litigation upon the subject, we have determined to examine them. These questions present themselves as follows; to-wit: 1. Whether the *lex mercatoria* of England is in force in this territory. 2. Whether the note declared upon is governed by that law. 3. Whether a suit can be instituted on said note, previous to the expiration of the days of grace recognized by the law merchant.

These three questions may be considered together. That

days of grace have been allowed in the United States, as in England, cannot but be admitted. In Chitty on Bills, 407 (note of the American editor), we find the following: "The days of grace as allowed in England, are generally allowed in the United States. At least no traces can be found of a contrary decision except in the state of Massachusetts, where it is held that no days of grace are allowed unless stipulated in the contract itself." In the case of Renner *v.* Bank of Columbia, 5 Condensed Rep. 693, the Court say: "We admit in the most unqualified manner, that the usage of making the demand on the third day of grace, has become so general, that Courts of justice will notice it *ex officio* and in the absence of any proof to the contrary, will presume that such was the understanding of all parties to a note when they put their names to it."

The Supreme Court of Indiana, 1 Blackford 82, says that the doctrine is applicable to that state, although they have no statute recognizing the law merchant.

In the case of Hogan *v.* Cuyler, 8 Cowen, 203, it was decided that the three days of grace are allowed, as between the maker and holder of a promissory note.

*The doubt with us was not so much as to the gen- *97
eral adoption in the United States of the *lex mercatoria*, as to the necessity of such adoption being proven in the Courts of the territory. The latter doctrine is applicable to customs which prevail in foreign countries and which have not been recognized here. See Consequa *v.* Willing *et al.*, 1 Peters C. C. R., 225. But as the law merchant has been so generally recognized by the Courts of the country, *ex officio*, we feel bound to recognize it until it be shown by testimony that it does not prevail.

The judgment of the Court below will be affirmed with costs.

WILKIE & TULLER *v.* JONES.

Error to Des Moines.

Where by publication a defendant in attachment is required to appear and plead by the *next term*, this refers to the *next general term*, provided a special term has not been duly ordered at the time of the publication.

Attachment being a violent remedy, the law is to be strictly construed.

Where there is no personal service, but judgment is rendered on the attachment and publication, it should be entered up *in rem.* and not *in personam* (*f*).

This suit was commenced against the plaintiffs in error by summons and attachment, returnable to the February term, 1840. The attachment was served on the property of the defendants below, but the summons was returned "not found." There being no appearance at the February term, publication was made, pursuant to law, requiring defendants to appear and plead at the *next term*, or judgment would be entered up against them.

Before the next regular term, a special term was appointed, and held in May, of the same year. At that special term, judgment was entered up against the defendants *in personam* by default, which the plaintiffs in error insist was erroneous in two particulars.

1. Because it was entered up at the special term.

2. Because it was entered up *in personam*, it being a proceeding *in rem.*

WM. H. STARR, for plaintiff in error.

*98 *BROWNING, for defendant in error.

BY THE COURT, WILSON, JUSTICE.— This action was commenced on the 31st December, 1839, to February term,

(*f*) No personal judgment can be rendered against a defendant served by publication only, who has not made an appearance. Rev. § 3164.

1840. Summons was issued and returned to February term, not served. Notice was published 31st March, 1840, to defendants to appear at *next term.*

The proceeding in attachment, as authorized by the statutes of the several states, is always viewed as violent proceeding. A proceeding wherein the plaintiff at the inception of his suit seizes upon the property of the defendant without waiting to establish his claim before the judicial tribunals of the land, and the statute authorizing it has invariably received a strict construction. The statute of Iowa, page 55, sec. 20, provides that "if the process by which the suit is commenced should not be served upon the defendant, and a voluntary appearance be not entered by him before the end of the term at which the writ of attachment aforesaid was made returnable, immediately after such term, the clerk who issued said writ shall make out an advertisement in which he shall state the names of the parties, the time when, from what Court, and for what sum said writ of attachment issued, and that unless the defendant appear and plead before the next term of the Court, judgment will be entered and the property so attached will be sold to satisfy the same." It appears that immediately after the expiration of the February term, a notice was made out by the clerk to the defendants to appear at *next term*, &c., without mentioning the time at which the term would commence.

No special term could, at the time of the publication of the notice, be legally anticipated, because the steps to authorize any special term had not been taken. The statute, page 129, sec. 8, provides that "whenever the Judge of any of the districts shall consider it necessary that a special term of the Court shall be held in any of the counties of his district for the trial of either criminal or civil causes, he shall notify the sheriff of the said county of the same, and it shall be the duty of the sheriff to put up at each of the precincts in said county a notice of the time when said

Court shall commence, at least three weeks previous to said special term." If the notice had even been put up at the different precincts in the county, at the time of publication of notice, and three weeks had elapsed from the time of such posting up, one of the essentials to the creation of the special term did not exist, and the time of holding such term was not established. Therefore, the notice could not contemplate or point to any term except a term known
*99 to the law at the time of *such publication. We think that it was error to take judgment at the special term. This is the construction which the spirit of the law would seem to indicate — any other might operate with great oppression and hardship to defendants.

As to the second point presented by the bill of exceptions, we are of the opinion that, as there was no personal service, the judgment should have been *in rem*, and not *in personam*. The 24th section of the attachment law (p. 56), provides that the final judgment in this action shall be conclusive so far as regards the property attached.

The 25th section authorizes a sale of the property attached to satisfy the plaintiff's demand, and the 26th section authorizes the institution of a new suit, if the proceeds arising from the sale of the property attached be insufficient. These sections, together with the adjudications of Courts upon similar questions, warrant the conclusion that there was error in entering up the judgment *in personam*.

The judgment below is reversed.

DAVIS *v.* MORFORD and others.

Error to Muscatine.

It does not appear to be imperative on the Court to refer the assessment of damages to the clerk (*g*).

At all events, as it is a matter of mere calculation, unless some error of computation is shown, the judgment will not, on that account, be reversed.

Where the action is debt, and the form of the judgment is as though it had been assumpsit, it is no fatal error.

This was an action of debt, brought by defendants in error on a speciality, judgment by default, and assessment of damages by the *Court*. The judgment is in form of assumpsit.

WHICHER, for plaintiff in error.

HASTINGS & DAY, for defendants in error.

BY THE COURT, MASON, CHIEF JUSTICE. — The first two errors assigned in this case, are, in substance, that the action being in *debt*, the *form of the judgment *100 is as though the action had been *assumpsit*. We do not think this such an error as should affect the judgment. It is erroneous only in form, and could work no prejudice to the defendant.

The third error alleged is, that the Court appears to have assessed the damages, when the law provides that the Court *may* direct the clerk to do so. The language is not imperative, and seems to leave the matter optional with the Court. It authorizes the matter to be referred to the

(*g*) The statute now regulates the mode of assessing damages in default cases. Rev. §§ 3151, 3553; see also B. & M. R. R. Co. *v.* Shaw, 5 Iowa, 463; McGregor *v.* Armill, 2 *ib.* 30; Stevens *v.* Campbell, 6 *ib.* 538; Cook & Owsley *v.* Walters, 4 *ib.* 72; Rife *v.* Ingraham, 3 Gr. 125.

clerk, because it is one of mere calculation. At all events, if there were no error shown in this calculation, the plaintiff in error has sustained no injury. As nothing of this kind is alleged, the judgment below will be affirmed.

William G. Holmes *v.* John Wright.

Error to Muscatine.

It is no ground of error, that the venue in the declaration is laid in the wrong county (*h*).

Hastings, for plaintiff in error.

Lowe & Whicher, for defendant in error.

By the Court, Mason, Chief Justice. —The first assignment of errors in this case alleges, that the writ summons the defendant to appear in the District Court of Muscatine county, while the venue in the declaration is laid in Johnson county. This is a matter of form, which might have been set right by special demurrer, but furnishes no ground for disturbing the judgment.

The other point, that the judgment being upon a promissory note, by default, no writ of enquiry was awarded, and no verdict rendered upon the same, is sufficiently answered by referring to the statute, and to the case of Davis *v.* Morford and others, just decided. The judgment below will, therefore, be affirmed.

(*h*) It is unnecessary, under our system of pleading, to lay the venue in the petition (declaration) except in actions for the recovery of real or personal property, for *injuries* to real property, for the foreclosure of mortgages or other charges on land, for partition of lands, and in actions to recover fines, &c., and actions against officers and on official bonds. Rev. §§ 2795, 2796. Generally, in personal actions *ex contractu* the venue need not be stated; Crouch *v.* Crouch, 9 Iowa, 269.

*James Davis *v* J. W. Brady & Co. *101

Error to Muscatine.

Where a plea is filed before default is actually taken, it is in time, although filed after the time when the plaintiff might have taken a judgment by default (*i*).

The rules of Court permitted the plaintiff to take judgment by default, if no plea was filed by the morning of the second day of the term. In this case the plea was not filed till the evening of the second day, but no default had been previously taken. The plaintiff, however, regarding the plea as a nullity, afterwards took a judgment by default, which constitutes the error now complained of.

Whicher, for plaintiff in error.

Lowe, for defendant.

By the Court, Mason, Chief Justice. — The record in this case exhibits a material error. Before any default was entered up, a plea appears to have been filed, notwithstanding which, judgment was rendered by default The counsel for the defendants in error contend that, inasmuch as the plea was not filed until the *evening* of the second day of the term, and as the rule of Court requires, in effect, that it should have been filed by the morning of that day, the defendant below was actually in default, and that the plea was too late.

(*i*) To the same effect are the following cases; The Canal Bank *v.* Newberry, 7 Iowa, 4; B. & M. R. R. Co. *v.* Marchand, 5 Iowa, 468; Sample *v.* Griffiths, *ib.* 378; Levi *v.* Monroe, 11 Iowa, 453; Markey & Fitting *v.* Mettler, 1 Iowa, 528; Lyon *v.* Bunn, 6 Iowa, 48; Seachrist *v.* Griffeths, *ib.* 390; Taylor, Shipman & Co. *v.* Runyon & Brown, 9 Iowa, 522; Smith, Twogood & Co. *v.* Coopers & Clarke, *ib.* 415; Wolff & Hoppe *v.* Hagensick, 10 Iowa, 590.

Admitting that the rules adopted in 1839 are still in full force in Muscatine county, and that we can judicially take cognizance of that fact, still, those rules only declare that, where the defendant does not plead by the second day, the plaintiff may take a judgment by default at the next regular call of the roll of attorneys. If he does not avail himself of this privilege, the defendant may still plead. A plea is in time previous to the actual entering up of a default, unless there is some express rule of Court to the contrary. The transcript does not show such a rule here.

The judgment of the Court below will, therefore, be set aside, and the case remanded to the District Court of Muscatine county.

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*102 *JAMES CHAMBERS *v.* ISAAC J. LATHROP.

Error to Muscatine.

A general demurrer to the whole declaration must be overruled whenever either of the counts therein is good (*k*).

There seems to be no necessity for the intervention of a jury where the plaintiff is entitled to a fixed amount, or one which may be ascertained by arithmetical computation.

Lathrop brought an action of covenant against Chambers, and declared as follows: "For, that whereas, heretofore; to wit: On the 13th day of February, A. D. 1837, at the county aforesaid (Muscatine county), by a certain covenant then and there made, between the said plaintiff and

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(*k*) This is still the rule under the present system. Sample *v.* Griffith, 5 Iowa, 376; Darr *v.* Lilley, 11 Iowa, 4; Edmunds *v.* Cochran, 12 Iowa, 488; Jarvis *v.* Worick, 10 Iowa, 29; Coon *v.* Jones. *ib.* 131; Hayden *v.* Anderson, 17 Iowa, 158.

the said defendant, sealed with their seals, and to the Court here shown, the date whereof is the day and year aforesaid, by which the said defendant did covenant and promise to pay to the plaintiff the sum of seventy-five dollars. And the plaintiff, in fact, avers that the said defendant hath not paid the sum of money aforesaid.

"And for that, whereas, the said plaintiff and the said defendant, on the 13th day of February, A. D. 1837, at the county aforesaid, made a certain article of agreement, or written obligation, under their hands and seals, according to the words following; to wit: 'Article of agreement made and entered into this 13th day of February, A. D. 1837, between James Chambers, of the town of Salem, and territory of Wisconsin, county of Muscatine, of the one part, and Isaac J. Lathrop of the same place, of the second part: I, the said James Chambers, doth agree to give to the said Lathrop the sum of seventy-five dollars, and to let him take the cord-word that he has cut, and to give him reasonable time to quit the claim that he now lives on, and that the said Lathrop is to give up the claim to the said Chambers, in peaceable terms; and we, for the true performance of this article, do bind ourselves in the penal sum of one hundred dollars, as witness our hands and seals this day above mentioned.

"'JAMES CHAMBERS, [SEAL].
"'ISAAC J. LATHROP, [SEAL].

"'Attest: JOHN VANATER.'

"By which said covenant and agreement the said defendant *promised to pay the sum of seventy-five *103 dollars to the said plaintiff, according to the covenant and agreement aforesaid. And yet, the said plaintiff saith, that although he, the said plaintiff, hath performed his part of the said covenant and agreement, yet the said defendant hath neglected to perform his part of the same, and still neglects, and wholly refuses so to do, though of-

ten requested, to the damage of the said plaintiff two hundred dollars, wherefore he sues, &c."

To this declaration there was a general demurrer, which was overruled, and thereupon there was a judgment entered for the plaintiff for seventy-five dollars and costs. A writ of error was then brought and the following errors assigned.

1. The Court erred in overruling the general demurrer to the declaration.

2. In rendering judgment without the intervention of a jury of inquiry.

3. (The same in substance as the second.)

HENRY W. STARR, for plaintiff in error.

LOWE, for defendant in error.

BY THE COURT, MASON, CHIEF JUSTICE.—The declaration in this case consisted of two counts, to which there was a general demurrer. This being overruled, judgment was rendered for the plaintiff, for seventy-five dollars and costs, without the intervention of a jury.

It is assigned for error, in the first place, that the demurrer should have been sustained. If either count of the declaration was good, the demurrer was properly overruled. Although neither of the counts seem drawn up with much professional accuracy, and although the first is doubtless defective, the second appears sufficient in substance to sustain the judgment already rendered.

The other error assigned is, that judgment was rendered on the demurrer, without impannelling a jury to assess the damages. There certainly seems no necessity for the intervention of a jury where the plaintiff is entitled to recover a fixed amount, or one which may be ascertained with arithmetical computation. This case seems to stand in such a predicament. The whole burden of the declara-

tion on which judgment was rendered is a claim of seventy-five dollars, to which, by the result of the proceedings, the plaintiff has become actually entitled.

The judgment below will, therefore, be affirmed.

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*104 *HENRY HARDMAN *v.* AARON CHAMBERLIN.

Error to Cedar.

The statute which exempts the plaintiff from the necessity of proving the signature of a note, &c., unless denied under oath, does not extend to the endorsement. That must in all cases be proved (*l*).

The facts of the case will appear from the opinion of the Court.

LOWE & WHICHER, for plaintiff in error.

HASTINGS, for defendant in error.

BY THE COURT, MASON, CHIEF JUSTICE.— This action was brought on two promissory notes, executed by the plaintiff in error to one Ransford, and by him assigned to the defendant in error. On the trial, the counsel for the plaintiff below offered to read the assignment without proof of the signature of Ransford. This was objected to by the defendant's counsel, but the objection was overruled by the Court.

We think the Court erred in permitting the assignment to be read without proof. The statute renders proof of the signature of a note unnecessary, unless denied under oath. This statute is an encroachment on the common law, and should not therefore be extended beyond the fair import

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(*l*) The statute of 1862, now in force, applies to the endorsement, as well as to the signature to the note. Ch. 28, laws 9th general assembly.

of its terms. Besides, the defendant must be presumed to know whether he has signed the note himself, and may therefore be reasonably required to make the affidavit denying the signature. But he cannot with so much justice be called on to deny the endorsement in the same manner, or else to admit its genuineness.

The judgment below will, therefore, be set aside, and the cause remanded for a new trial.

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*105 *E. A. Johnson & Co. *v.* Jeremiah Smith.

From Des Moines.

Where a person becomes indebted to a partnership as a firm, they may sue him by their partnership name and style (*m*).

The defendant bought goods of the plaintiffs, who were wholesale dealers under the name of E. A. Johnson & Co. Suit was brought by them in that name, to which the defendant pleaded *non assumpsit.* Under this plea the defendant at the trial, objected that suit could not be maintained by the plaintiffs without setting out their individual names. The amount of indebtedness was not disputed. By mutual consent this question was reserved in the Court below in order to be submitted to the Supreme Court with an understanding that the Supreme Court should render judgment for the plaintiff or defendant, as the question was decided in favor of the one or the other.

Grimes, for plaintiffs, contended that under the plea of *non assumpsit*, it was now too late to take advantage of

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(*m*) By § 2785 of the Revision, a partnership may sue and be sued by the firm name, and they may also sue and be sued by the individual names of the partners.

this defect in the declaration, and cited Tidd's Prac. 448, Chitty Pl. 281, 511; 10 Serg. & Rawle, 257, 12 Petersdorff, Abr. 660, 667.

Browning, *contra*, insisted that misjoinder may be taken advantage of on the trial, and cited Chitty Pl. 14, 15; 8 Serg. & Rawle, 53, 308; 5 Serg. & Rawle 537; 6 Mass. 460; 10 Mass. 379; 3 Johns. Cases, 384; 1 Wash. R. 9; 15 Johns. 482; 16 Johns. 34, 146; 18 John. 459.

By the Court, Mason, Chief Justice.—This was an action of assumpsit brought by the plaintiffs, who are a mercantile firm in St. Louis, against the defendant for goods sold and delivered. The plea was *non assumpsit*, and the only question to be determined is, whether under these circumstances, a suit may be sustained in the name of the firm. Our statute, enabling plaintiffs to bring suit in this manner, is limited in its operation to those brought on promissory notes, bonds, bills, or other instruments of writing, and would not reach a case of this kind. The whole case therefore turns upon the construction of what should be the law, independent of statute.

The authorities cited by the counsel for the defendant, are all cases of misnomer of the plaintiff. There is no doubt but this may be taken *advantage of under *106 the general issue. But in the present instance there is no allegation that the name of the firm is not correctly set forth. We must therefore look in a different direction for reasons on which to found a decision of this case.

No very weighty argument against allowing suits to be brought in this manner can be drawn from any other source, than that of precedent. The defendant dealt with the plaintiffs in their partnership capacity and under their partnership name. He could not therefore be surprised by the suit being commenced by them under that name. A recovery in the present action would be quite as effectual

a bar to a subsequent suit for the same demand as though the nanes of the partners had been particularly set forth.

Formerly the Courts were fastidious in requiring the names of the partners to be particularly set forth and proved, and in regarding a failure in this respect as a fatal defect at any stage of the proceedings. But this strict rule has been continually undergoing modifications, in order to encourage and facilitate the operations of mercantile traffic. If this could become a new question in the states of the Union, or even in England, we believe the Courts would regard mercantile partnerships as persons in law capable of sustaining or defending suits when brought by or against them in that capacity.

We are now in that very situation, and we think it better to lay down such a rule in the commencement as will not require continual alteration. This rule will be to permit the plaintiff to make his legal demand for payment under the very name by which the credit was given.

Judgment will therefore be rendered for the plaintiff, pursuant to the stipulation filed in this case.

Anderson C. Wilson *v.* Johnson King.

Error to Henry.

An omission of the name of the month, in the date of the service of a writ, is not material, where there is sufficient in the circumstances of the case to show due service (*n*).

It is no material variance, that where the instrument stipulates for twelve per cent interest, the declaration makes no mention of interest at all.

(*n*) See Meldrum *v.* Clark, *post*, 130; Partridge *v.* Patterson, 6 Iowa, 514; Anderson *v.* Kerr & Lacey, 10 Iowa, 236; Holmes & Avery *v.* Budd, *et al.* 11 Iowa, 186.

Anderson C. Wilson *v.* Johnson King.

*It is not necessary for the record to show proof of the signature of the defendant to the note, where judgment is taken by default at the first term after suit is commenced. This will be presumed, unless the contrary appears (*o*). *107

Where a note stipulates for twelve per cent interest the judgment should draw interest at that same rate (*p*).

Action of debt on an instrument of which the following is a copy:

"On or before the 25th day of December next I promise to pay Johnson King, or order, the sum of eighty dollars for value received of him, with twelve per cent interest when due, until paid, this 2d day of June, 1840. As witness my hand and seal.

"(Signed) A. C. WILSON, [SEAL]."

The other facts of the case sufficiently appear from the opinion of the Court.

G. W. TEAS, for plaintiff in error.

J. C. HALL, for defendant in error.

BY THE COURT, MASON, CHIEF JUSTICE. — The first error assigned in this case is, that the sheriff's return does not show that the process was served ten days before the first day of the term at which the judgment was given. Unless the service were actually made ten days prior to the first day of that term, the defendant was not bound to plead, and the judgment by default was irregular. The sheriff's return states that it was served on the third ——— 1841, without naming the month; but inasmuch as the summons was issued on the 27th of February, and as the date of the return is March 4th, 1841, we are authorized to conclude that it was served on the third of

(*o*) See page 104, *ante*, note (l).

(*p*) See Revision ch. 72, art. 2, p. 316.

March of that year. As the Court in that county, at which judgment was rendered, commenced on the 14th of that month, there was ten days between the service and the first day of the Court.

An alleged variance between the instrument set out in the declaration, and that produced in proof, is another supposed error in the proceedings below. The declaration, in describing the instrument, makes no mention of interest, whereas, the instrument itself stipulated for twelve per cent interest from the time the money became due till paid. The writing obligatory is only set forth in the declaration according to its legal effect. Interest at some rate follows as a legal consequence from the time the money was due. Nothing more was done than to fix that rate. We do not think it was necessary to set this forth in the declaration.

*108 *The third error assigned is, that judgment was taken by default at the first term after the suit was commenced, without proving the signature of the defendant. If this should appear from the record, it would be error; for the statute requires such proof. But as the record is silent on this subject, the Court below will be presumed to have done its duty, and to have required the proof previous to allowing the judgment to be entered.

Lastly, the judgment was entered to draw twelve per cent interest, and this is deemed contrary to law. We do not think so. The statute fixes six per cent as the rate of interest when nothing is stipulated on that subject, but it allows the parties to contract for any rate not exceeding twenty per cent. When this is done, the rate thus agreed upon is substituted for that prescribed by law, and we think it should be continued until the money is actually received. The original contract may be regarded as merged in the judgment, it is true, still, we think the latter should carry out the spirit and intention of the original agreement. To do otherwise, would be to sacrifice justice to a legal fiction.

A different rule would enable the party to take advantage of his own wrong. Having failed to perform his agreement, and driven the other party to the necessity of resorting to a suit at law, it seems to us unjust that he should be enabled to take advantage of that circumstance for the purpose of avoiding one of the stipulations of his original contract. Except for the most cogent reasons, individuals should be allowed to make such contracts as they think proper, with which the laws should not interfere, except for the purpose of carrying them into effect.

The judgment below will, therefore, be affirmed.

PORTER & BRAZELTON *v.* MOFFETT.

Appeal from Henry.

A Court of Equity will relieve where, by the practices and management of the plaintiff, the defendant has been induced to suffer default in an action at law (*q*).

Where a bill is filed for an injunction and relief, and that part of the bill which sets forth the facts that would justify an interference was not sworn to, although the injunction would be dissolved, the bill should not be dismissed.

This Court will not enquire into the regularity of a default, in the District Court, unless the record shows it to have been contrary to the rules of that Court.

*Porter & Brazelton filed their bill in equity, pray- *109
ing for an injunction and relief. This bill set forth that Moffett had obtained a judgment at law against them by default. It set forth a meritorious defence to said ac-

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(*q*) Hoskins *v.* Hattenback & Charles, 14 Iowa, 314; Dixon *v.* Graham, 16 Iowa, 310; McGrigor *v.* Gardner, *ib.* 538. But the evidence must be clear and unequivocal that the judgment was wrongful and fraudulently obtained, and without fault or negligence of the party complaining. Humphrey *v.* Darlington, 15 Iowa, 207; Johnson *v.* Lyon, 14 Iowa, 431.

tion, and alleged as an excuse for not having appeared and defended the suit, that the plaintiff (Moffett) instituted his suit against them on the 30th of January, 1839; that on the 14th day of March, 1839, he filed his declaration in covenant against them;,that on the second day of April they appeared, by their attorney, and filed a demurrer to the declaration, and on the 3d of April they filed their plea of the general issue, and notice of special matter of defence; that on the 4th of April the demurrer was sustained, and leave granted to amend the declaration. May 1st, 1839, plaintiff filed a new declaration, not as an amended declaration. At the August term, 1839, the case was continued, and a rule entered on the docket of the Court for the defendants to plead by the first day of January, 1840. Complainants had no notice of this rule, nor do they know whether their attorney had or not; that their said attorney died during the autumn of 1839, not having previously filed any other plea than the general issue aforesaid to the first declaration before it was amended. They further state that, as there was no settled rules of practice in the District Court, and inasmuch as the said plea containing all their defence had been left on file, and there being no other attorney residing in the county, to whom they could, in their judgment, safely entrust their case, they did not deem it expedient to employ another attorney until the spring term of 1840.

Under this state of facts, the plaintiff entered default against them on the first day of January, on the clerk's docket, which is alleged to have been irregular. That default was confirmed, and judgment rendered thereon.

This bill was regularly sworn to, and thereupon an injunction was issued to stay proceedings in the suit at law.

An amended bill was subsequently filed, setting forth, in addition to the charges already made, that the reason why said defendants did not appear in the Court and

defend said suit, was, "that there was, in the fall of 1839, a compromise pending between said Moffett, and said Brazelton, acting for himself and said Porter about the matter in litigation, and it was *understood and agreed* that said suit should be withdrawn;" and they charge that Moffett entered into this pretended arrangement in order to deceive the complainants. This amended bill was not sworn to.

At the next term of the District Court, in Henry county, a motion was *made to dismiss the bill for *110 want of equity, apparent on the face thereof, which motion was sustained and the bill dismissed. Thereupon, an appeal was taken to the Supreme Court.

J. C. HALL, for complainants.

G. W. TEAS, for defendants.

BY THE COURT, MASON, CHIEF JUSTICE. — We see nothing in the original petition which should have prevented it from being dismissed. The District Court was clearly within the limits of its authority in ruling the defendant to plead by a day in vacation, and in entering up judgment at the subsequent term for want of such a plea. Whether the default was properly entered in vacation, we cannct enquire. The District Courts can make their own rules on that subject, and what those rules are we cannot know further than they are set forth in the record before us.

But the amended petition sets forth some ground for the interposition of a Court of Equity. It states that prior to the day on which the defendants were ruled to plead, there was a compromise pending between the defendant in this action and one of the complainants, and that it was understood and agreed that the suit should be withdrawn. This is alleged as the reason not only for not pleading in time, but also for not appearing at the next term of the Court.

If this be the true state of facts, their negligence was excusable, and they would be entitled to relief. It is true that the amended petition was not sworn to, and on that account a motion to dissolve the injunction would have been properly sustained, but after such dissolution the complainants would have been entitled to have proceeded with their suit, and to have obtained relief if they had shown themselves entitled to it, at the final hearing. The dismission of the petition improperly deprived them of this right. The order of the Court below, dismissing the petition, will, therefore, be reversed, and the cause remanded to the District Court of Henry county.

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*111 *JANE SETTLE *v.* JOAB HENSON.

Error to Des Moines.

The action of forcible entry and detainer, is not the proper action for trying titles of any description; the facts of actual possession by the complainant, and forcible entry, or forcible detainer, or both, by the defendant, are sufficient to determine the verdict (*r*).

Holding over, wilfully and with force, contrary to the terms of a lease, subjects the offender to this action, but in that case the title cannot come in question, for the tenant is not permitted to dispute the title of his landlord.

The first class of cases are in the nature of penal actions, and can only be instituted by him whose possession has been disturbed, and not by his assignee.

This was an action of forcible entry and detainer, brought by Settle against Henson, in the District Court for Des Moines county. From the bill of exceptions filed in the case, it appears that at the time the action was instituted the defendant was in possession of the land set forth in the complaint — that he had been duly notified by the plaint-

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(*r*) Harrow *v.* Baker, 2 G. 201, 204; Langworthey *v.* Myers, *et al.* 4 Iowa, 18; Bosworth *v.* Farenholtz, 4 Gr. 440.

iff to quit possession. It also appeared that the plaintiff had purchased the lands of the United States in October, 1839, which was prior to the institution of the suit.

The defendant then proved, that at the time the lands were thus purchased of the United States, one James Clark had possession thereof. It further appeared, by one of the plaintiff's witnesses, that the defendant, when notified to quit, assigned as a reason for not doing so, that he had rented of Clark.

Thereupon, the Court instructed the jury that the entry upon, and occupancy of, the unsold lands belonging to the United States, did not make the occupant guilty of forcible entry and detainer, in an action by the subsequent purchaser; that, under the plea of not guilty, such defendant might set up such previous occupancy against the claim of said plaintiff; and that, if the jury should believe, from the evidence, that said defendant had rented the land in dispute of the said James Clark, and that said Clark was in possession of the same, previous to, and at the time of, such purchase by said plaintiff, although such lease was made subsequent to the purchase of the land by the plaintiff from the United States, that they must find for the defendant; to which several instructions the council for the plaintiff excepted.

*The jury found a verdict for the defendant; a mo- *112
tion was then made for a new trial, and overruled, whereupon judgment was rendered for the defendant, and the plaintiff brought the case here for reversal.

The errors assigned point entirely to the above instructions of the Court.

Browning, for plaintiff in error.

Rorer, for defendant in error.

By the Court, Mason, Chief Justice.—This was an action of forcible entry and detainer, which the counsel for

the plaintiff has seemed to regard as an action of right, and has contended that the titles of the parties were to be enquired into, as decisive of the question.

This position is wholly untenable. This is not the proper action for trying titles of any description. A person may render himself liable for a forcible entry and detainer, by entering upon his own property, even when he has the right to immediate possession. The first and second sections of the statute, on this subject (Laws of 1838, and 1839, page 217), in defining the nature of the offense for which this action may be brought, make no allusion to any species of title. It is simply the matter of entering upon, and holding the property, which creates the liability. It is only necessary for the complainant to show that he was actually in possession, and that the defendant either forcibly entered, or forcibly detained, possession, or both, and his action will, in all cases, be sustained, whoever may have the title to the property, or the right of possession thereto.

There is another class of cases, in which an action of the same form will be sustainable. These are defined in the eighth section of the statute above referred to, and consist of those cases where tenants wilfully, and with force, hold over, contrary to the terms of their lease. But, neither in these cases can there be any trial of the right of property, or of possession, except, merely, by enquiring into the terms of the lease, to ascertain whether there has been a holding over. The tenant is not permitted to dispute the title of his landlord. Almost the same rule in this respect prevails here, therefore, as in the cases first above mentioned.

In regard to the first class of cases, the proceedings are in the nature of a penal action. The offending party may be punished by fine. The case at bar must fall within this class, for there is no pretence that the defendant was
*113 the tenant of the complainant, or of the United *States, under whom she claimed. Under these circum-

stances it was incumbent on the complainant to show that she was in possession at the time of the entry of which she complains. As she had never been in possession, she will be driven to an action of a different form in order to vindicate her rights. Clark, and those claiming under him, held the land at the time she acquired her title, and from that time till the commencement of this suit. She could not, therefore, institute the action. They claimed the right of possession, and this could not be enquired into in the action of forcible entry and detainer, nor in that of forcible detainer only. These actions are intended as summary remedies, to restore possession which has been irregularly molested, or where there has been a holding over in flagrant violation of the terms of a lease, but can never be made a substitute for the action of right. The instructions and decisions of the Court below were in perfect accordance with these views. The complainant was clearly unable to sustain this action, and the judgment of the District Court will, therefore, be affirmed.

Hosea Hall *v.* Solomon Biever.

Error to Jefferson.

The fifty dollar limitation of a justice's jurisdiction refers not to the whole of the plaintiff's account, but to the amount claimed to be still due thereon (*s*).

Where there is no return endorsed on the summons, that defect is cured by the appearance of defendant.

This action was commenced originally before a justice of the peace, and brought from thence to the District Court of Jefferson county, by appeal. There was no return en-

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(*s*) The amount claimed is the *criterion* of jurisdiction. Stone *v.* Murphy, 2 Iowa, 85.

dorsed on the summons issued by the justice, but the defendant appeared in that Court. The whole account filed by the plaintiff below was one hundred and thirty-one dollars, upon which there was a credit of eighty-two dollars and seventy-five cents, leaving a balance still claimed to be due of forty-eight dollars and twenty-five cents. Under these circumstances, as appears by the bill of exceptions, the counsel for the defendant below contended, that the jury could only regard the forty-eight dollars and twenty-five cents, the sum claimed to be due; and that if the *114 defendant could make proof *of any payment at all, their amount must be deducted from the sum thus claimed to be due; but the Court permitted the plaintiff to prove such payment to be included in the credit of eighty-two dollars and seventy-five cents, above mentioned.

J. B. & G. W. Teas, for plaintiff in error.

H. W. Starr, for defendant in error.

By the Court, Mason, Chief Justice.— This case came up on two bills of exceptions and was submitted without argument. The first exception is founded upon the fact that the Court refused to dismiss the cause on defendant's motion. The reasons for this motion were, 1st: That there was no return endorsed on the summons issued by the justice of the peace. The transcript, however, shows that the defendant appeared at the trial in this Court. This appearance cured all defects in the return. The second reason for said motion was that the justice of the peace had originally no jurisdiction of the cause, "as shown per account filed." The account here alluded to does not appear on the record in this Court, nor is there any thing else here by which we can infer such want of jurisdiction.

From the second bill of exceptions, it appears that the account filed by the plaintiff before the justice of the peace

amounted to one hundred and thirty-one dollars, although it appears that the balance actually claimed by him was only forty-eight dollars and twenty-five cents. The defendant's counsel moved the Court to instruct the jury that they could only take into consideration the sum of forty-eight dollars and twenty-five cents, as the plaintiff's entire demand, subject to the defendants's proofs; but the Court instructed the jury that they could investigate the whole account for the purpose of ascertaining the *balance due*, if any, but that they could not give a verdict for more than the forty-eight dollars and twenty-five cents, to which instruction an exception was taken.

This instruction was clearly correct. The jurisdiction of justices of the peace is limited to those cases where the sum claimed does not exceed fifty dollars. No matter, therefore, how great may be the entire amount of the plaintiff's account, nor even how great may be the defendant's actual indebtedness, if the account has heen reduced by payment or allowable offsets to the prescribed limit, or, if the plaintiff will voluntarily relinquish all over the amount of fifty dollars, he is entitled to sue in the justice's Court.

The judgment of the Court below will, therefore, be affirmed.

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*Hickok & Ross *v.* Labussier, for the use of *115 Huner.

Error to Des Moines.

In an action by the payee of a note, *not negotiable*, for the use of the assignee, it is not necessary to set forth the assignment, either in the declaration or in the copy of the note, such indorsement being only a piece of evidence (*t*).

(*t*) Under the Revision when the assignment is in writing a copy must be set out in or annexed to the pleading. See § 2920.

No formal notice of such assignment is necessary to render the maker responsible to the assignee. The suit being instituted for the use of the latter, is sufficient to put the maker on the enquiry; and if he pays money afterwards to the original payee, he does it at his peril.

A blank endorsement of such a note, and the possession thereof by the person for whose use the suit is brought, is sufficient to raise the legal presumption of a transfer to him.

The instrument declared on in this case reads as follows:—

"BURLINGTON, 24th March, 1837.

"Twelve months after date, we promise to pay Francis Labussier the sum of five hundred dollars, for value received.

"(Signed) LUTHER W. HICKOK,
"JNO. ROSS."

No endorsement or assignment was set forth in the declaration. The suit, however, both in the writ and declaration, was entitled, "Francis Labussier, who sues for the use of Jacob Huner *v.* Luther W. Hickok and John Ross." The defendants plead *non assumpsit* and some other pleas, which, however, were not relied on upon the trial. The other material facts may be gathered from the following bill of exceptions, which was filed in the case; to-wit:

"Be it remembered that on the trial of this cause, which was an action brought on a note executed by the defendants to said Labussier, and *not negotiable*, executed on the 24th day of March, 1837. In the declaration and writs there was no mention made of the endorsement or assignment of said note to said Huner, and in said declaration there was a copy of said note given without setting out any endorsement or assignment on the same, all of which will more fully appear by reference to said declaration, writs, and copy of said note. The plaintiff offered in evidence

said note (which had not before been filed in the suit), as the ground of his cause of action and as evidence of his demand, *on which said note there was a blank *116 endorsement by said Labussier, and no other evidence of the transfer of said note by said Labussier to said Huner was given on the trial, which said note is now a part of the record in this cause. The defendants then offered in evidence, under the plea of the general issue, a receipt in full against said note from said Labussier, dated the 30th day of September, 1839, which was more than two months after the service of the said writ on said defendants; which said receipt is hereby referred to as a part of the record in this cause.

"The plaintiff then moved the Court to instruct the jury that the blank indorsement on said note was sufficient to pass all the equitable interest in said note to said Huner, and that it was not necessary for said Huner to introduce any other evidence of said assignment than said endorsement, and that it was not necessary for said Huner to set out or make any mention of said endorsement in his said writ or declaration, and that said Huner might introduce said endorsement on the trial as evidence of his title to the same, and that said endorsement was sufficient *prima facie* evidence within itself of said Huner's title to said note; and, also, that said suit having been brought in the name of said Labussier, for the use of the said Huner, although said note was not negotiable, that said Huner was the real plaintiff, and that said Labussier could not dismiss said suit nor discharge said cause of action by receiving payment from said defendants and receipting for the same in full after the service of said writ, although no mention was made of said endorsement in the record, and that Labussier could not control said action in any manner whatever. Also, to instruct the jury that if they should be of opinion that said note was endorsed by said Huner after the taking effect of a law passed by the legislature of Iowa, approved

January 4th, 1839, concerning promissory notes, &c., although said note was made previous to the passage of said law, that said subsequent endorsement would pass all the legal interest in the same to the said endorsee, all of which said instructions were given in charge by the Court to the jury, to which said opinion and instructions of the Court the defendants except.

"The defendants then moved the Court to instruct the jury, that they having produced a receipt in full for said note from said Laubussier, that it then devolved upon said Huner to prove a special assignment or transfer of said note to him, by said Labussier, and notice of the same to defendants, previous to the date of said receipt, from said Labussier, for the payment of said note, or a special *117 promise to pay said Huner *the amount of said note as endorsee, previous to the date of said receipt from said Labussier; but the Court being of a different opinion refused to give said instructions."

To this the defendants excepted, and brought the case up here for reversal.

Browning & Grimes, for plaintiffs in error.

Rorer & Starr, for defendant in error.

By the Court, Mason, Chief Justice. — This case comes up on a bill of exceptions, and we shall, therefore, examine and dispose of each of the material questions therein raised, in their order. And, first, was it necessary that the blank endorsement on the note should have been set forth in the declaration or given with the copy? We think not. The statute requires that a copy of the instrument of writing, on which the suit was brought, should be filed with the declaration. In the case of an ordinary negotiable note, where the suit is brought in the name of the assignee, such endorsement becomes a material part of the

instrument. It is absolutely necessary that it should be set forth, in order to avoid the effect of a general demurrer.

But in the case of a note not negotiable, the case is different. The plaintiff, in the first instance, is not bound to set forth or prove the assignment at all. Such proof only becomes necessary where the defence set up can only be defeated in consequence of the assignment. Swan's Treatise, 208 and 209. It was not even necessary that the name of the assignee should have appeared on the docket, provided, that after the production of the receipt from Labussier, the plaintiff had proved the assignment and notice to the defendants of a date prior to that of the receipt. The endorsement is not, therefore, a part of the instrument declared on, but is merely to be used by way of rebutting evidence upon a certain contingency, and is no more necessary to have been set out in the copy filed with the declaration than though such evidence had been contained in a separate instrument, or than though it had been by parol.

In the next place, as to the receipt. This was wholly nugatory, if the note had been previously assigned, and knowledge thereof communicated to the defendants. No formal notice for this purpose was necessary. It is enough if, from the facts and circumstances, it may be fairly presumed that the debtor had positive notice of the assignment. 12 Johns. Reports, 343. The name of the assignee being mentioned in the summons was, we think, sufficient notice to the defendants that *he was beneficially in- *118
terested, and if they paid money to Labussier afterwards, it was at their own peril. Swan's Treatise, 208.

Whether the legal interest in the note was or was not in Hyner, cannot affect this case, except that it may, in the former case, be contended that the suit should have been brought in his name directly. The instruction in that case asked by the plaintiff would have been pointedly

against himself; and, if there was error in the instruction of the Court, that error was in favor of the defendants. At all events, we see nothing in this point which should work a reversal of the judgment.

The only question that remains to be disposed of, is in relation to the sufficiency of the proof of assignment. Was the blank endorsement of itself *prima facie* evidence of this fact? or, after Labussier's receipt in full had been produced, was a special assignment to Huner necessary to be proved? We are clearly of the opinion that no formal transfer was necessary to be shown. We also think that the endorsement in blank is, of itself, presumptive evidence of the assignment; that it is equivalent to a power of attorney authorizing the holder to sue in the name of the endorser, and to apply the avails to his own use; that the assignee may, at any time, even in Court, fill up the endorsement to this effect; and that, if not filled up, this will be deemed the import and construction of it. Swift's Digest, 434. We are of the opinion, therefore, that the blank endorsement, and the possession of the note by Huner, were sufficient to create the legal presumption of an assignment of the note to him, and that this instruction of the Court to the jury was also correct. The judgment of the Court below will, therefore, be affirmed.

Joseph S. Sater and Wm. Wade *v.* David Hendershott.

JOSEPH S. SATER and WM. WADE *v.* DAVID HENDERSHOTT, for the use of Redman and Eberman.

Error to Des Moines.

Where the endorsement of a note is special, and made in the usual manner, the legal interest passes entirely to the endorsee, and he can only sue in his own name. (*u*).

Such an endorsement is a transferable contract, between the endorser on the one side, and any subsequent holder on the other, and can only be rescinded by the *mutual agreement of those parties. *119

When the note comes again into the ownership of the payee, both these parties become united in his person, and he can then erase all the endorsements.

The mere fact that a suit is instituted in the name of the payee, for the use of the endorsee, is, of itself, no evidence that the payee is in *possession* of the note, and still less that he is entitled to bring suit thereon.

Before the statute of Iowa in relation to promissory notes, it is doubtful whether the endorsee could sustain debt on a negotiable instrument. In case of a sealed instrument, therefore, which has been specially endorsed, inasmuch as the action must be debt, the endorsee may sue in the name of the payee, to his use. The law will not, in such cases, compel him to try doubtful experiments.

The payee of a sealed note, when he endorses it over in blank, thereby authorizes the endorsee to sue in his (the payee's) name, for the use of the endorsee; for the law enters into and forms a part of the contract. If, therefore, after the note is thus endorsed, a statute authorizes the endorsee to bring suit thereon in his own name, and even declares a transfer of the legal interest to him, this will not prevent him from suing in the name of the payee, for his own use, for this would be impairing the obligation of a previous contract.

(*u*) Under the Revision of 1860 and the decisions, the party holding the legal title to a note or instrument may sue on it, though he be an agent or trustee, and the party beneficially interested, though he may not have the legal title, may sue in his own name. Cottle *v.* Cole & Cole, 20 Iowa, 485, 486; Rice *v.* Savery, 22 Iowa, 470; Rev. §§ 2757, 2758. The equitable rule now applies to law actions. Conyngham *v.* Smith, 16 Iowa 471.

Joseph S. Sater and Wm. Wade *v.* David Hendershott.

Action of debt, commenced by defendants in error against plaintiffs in error. Plea, *non est factum*. Judgment for plaintiffs below; and bill of exceptions as follows:—

"Be it remembered that, on the trial of the above cause, the plaintiff offered in evidence, as the ground of his action, a note or bond executed by the said defendants to David Hendershott, or order, which said instrument had been specially assigned by said Hendershott, and also several subsequent assignments, which will more fully appear, reference being had to said instrument now on file in this cause. The defendant then offered to prove, by said Hendershott, that he had assigned away his interest and right of action in said note or bond, and that he had never since said assignment, by any trade or otherwise, acquired any right of any description to said note or bond; and, also, moved the Court for a nonsuit, on the ground that said Hendershott had parted with his interest and right of action in said note or bond, and that said suit could not be maintained in his (said Hendershott's) name; both of which said motions, by said defendants, were overruled by the Court; and the Court decided that, although said Hendershott had parted with his interest in said note or bond, and although the legal right to the same was in a third person, yet the said suit could be maintained in the name of the original payee, and that said defendants would not be admitted to bring evidence to prove that the right of action was not in said plaintiff. The endorsements on the above mentioned note were erased previous to the *120 *trial, except that the pen was not drawn through the name of D. Hendershott. To which said several opinions and instructions of the Court the defendants, by their attorneys, except, &c."

The following is a copy of the writing obligatory, or note referred to in the case, with the endorsements:—

"On or before the twenty-fifth day of December next we, or either of us, promise to pay David Hendershott, or order, one hundred and seventy-five dollars, for value received of him. Witness our hands and seals this tenth day of April, 1837.

"JOSEPH S. SATER [SEAL],
"WILLIAM WADE [SEAL].

"Warren county, Illinois."

"I assign the within to John F. Eberman and Nancy Redman, without any recourse on me.

"Dec. 2, 1837. D. HENDERSHOTT."

"I assign the within to Haywood Reed, for myself and Nancy Redman, without recourse on us, this 12th day of December, A. D. 1837.

"JOHN F. EBERMAN."

"Pay the above to John Pierson, without recourse on me.

"December 16th, 1837. HAYWOOD REED."

BROWNING & ROBER, for plaintiffs in error.

GRIMES, for defendant in error.

The counsel for plaintiffs in error rely on the following points and authorities: —

First. That the payee of a negotiable note cannot maintain a suit in his own name on such note, if he has negotiated the same, and the legal interest of the note is in another.

Second. To enable such payee to maintain an action in his own name after transfer, he must regain the legal interest and possession by some act or circumstance equal in law to that by which he disposed of such note; to-wit: such as a re-endorsement to him by the endorsee, and delivery thereof in accordance with such *re-endorsement.*

Third. That the instrument sued on in this cause is a negotiable note within the meaning of the statute. *121 It is payable to the payee "*or * order;*" and the Michigan statute, which was in force at the date of said note, declaring what notes should be negotiable, extends, in express language, to "*all notes* in writing," &c., regardless of a seal. But this note was made in Illinois. See laws of Illinois, 482, sec. 3; Blackford's Rep. 437; 1 Gill & Johnson's Rep. 175; 3 Wheat. Rep. 172; 1 Ch. Pl. 10; 4 Cond. E. Rep. 649; *ib.* 1, 416; 1 Cranch, 152; 1 Wheat. Rep. 233; 1 Wash. Cir. Rep. 424; 5 Wheat. Rep. 277; Ch. on Bills, 30.

BROWNING. In case where payee has endorsed the note in blank, it is no evidence of assignment, and payee may maintain action in his own name. Where the assignment is *special*, payee cannot maintain action in his name. The only thing that distinguishes this note from an ordinary note is the seal. If note is made to Hendershott, or order, and assigned, in an action brought in name of Hendershott, any subsequent transaction cannot be given in offset.

GRIMES for defendant. The fact of an individual having a note in his possession, is presumptive evidence that he is owner. The endorsements were all erased, and we do not see how the Court could take cognizance of them. Bank of Utica *v.* Smith; Ch. on Bills, 257; 1 Dall. 193; Morris *v.* Forman, Am. Dig. 68; 1 So. Car. R. From these authorities it appears that a party may strike out endorsements and maintain action in his own name.

ROBER. Hendershott could not sue in his own name unless legally endorsed back, or he had purchased the note back in course of trade, and struck out the endorsements. They had no right to strike out the endorsements unless Hendershott had purchased it back, of which there was no evidence. Where a note comes back to payee, he can strike out the endorsements and bring suit in his own

name. But this does not apply where the payee comes into court and swears that it had not come back to him, as he did in this case. He swore that he had assigned away said note and had never afterwards acquired an interest in it.

The counsel say that possession in Hendershott is evidence that it had come back to him. But this cannot be evidence where it is rebutted by positive evidence that it had not come back to him.

The seal upon a note makes no difference.

If the statute is remedial, it only makes the note more negotiable.

By the Court, Mason, Chief Justice.—Had the instrument declared on in this case been an ordinary promissory note the case would *have presented little *122 difficulty. Where a note of that kind is endorsed in blank, the endorser may sue in his own name, or in the name of the payee for his own use. The latitude of authority contained in the blank endorsement, being sufficient for either purpose, and conferring that option upon the endorsee.

But where the endorsement is special, the case is different. If made in the usual manner (as in the present instance) the legal interest passed entirely to the endorsee. No choice is left him. He cannot regard himself as agent or attorney of the payee to collect the money for his own use, which a blank endorsement would have authorized him to do. The will of the endorser is specifically expressed, and becomes a part of the instrument. The endorsee has no more right to erase or change the endorsement than he has the face of the note. He can only sue in his own name.

The note may, however, again come into the legal possession of the payee, either in the course of trade, or by making payment in discharge of his liability to the endorsee. In either of these cases he would have a right to erase the endorsements, whether general or special, and to

bring the suit in his own name as payee. The reason why this erasure could not be made by any other person is, that the endorsement is a species of transferable contract, or, at the least, the evidence of one — which neither party alone has a right to rescind. The parties interested in that contract are the payee of the note on the one side, and any endorsee and holder of the note on the other. By the mutual agreement of these parties, all the endorsements may be erased. When the note comes again into the legal possession of the payee, both the parties in interest in the contract aforesaid become united in the same individual, who has therefore power to expunge all the endorsements on the note, and to sue in the same manner as though he had never parted with the possession of it.

There is some diversity of opinion as to the proof necessary to show that the note has again come into the legal possession of the payee. In Dugan *v.* The United States, 3 Wheat. 183, it was held that it was not necessary for the payee to produce any receipt or endorsement back to himself. The bare possession of the note by the endorser has sometimes been held *prima facie* evidence that he was again the legal owner thereof. 1 Dall. 191 and note. But in the case of Long *et al. v.* McCarty, 2 Dall. 147, proof of actual payment to the endorsee was considered necessary to enable the endorser to sue in his own name.

*123 *But whatever be the strength of the presumption in favor of the payee, who has again obtained the actual possession of the note, the mere fact of a suit being instituted in his name for the use of the endorsee, is of itself no evidence whatever that the payee is in possession. The endorsee may have brought the suit in that form without his consent or knowledge. At all events, the mere institution of a suit in that form raises no presumption that the payee is again in the legal possession of the note, and was so held in the case of Bowie for the use of Ludd *et al. v.* Duval, 1 Gill and John, 175. If, therefore, the instru-

ment on which this suit was brought had been a mere promissory note, there was evidently error in the Court below.

That instrument was, however, under seal, which places the case in quite a different attitude. In the absence of special statutory provisions on the subject, this would be the safest, if not the only mode, in which the endorsee of a writing obligatory could institute his action against the maker. The instrument being under seal the action must be debt, and there is very high authority for the conclusion that the endorsee cannot sustain debt against the maker of a negotiable instrument. See Chitty on Bills, 672. But more especially Chitty's Pleadings, 117 and 124. If this be the case, and if the endorsee be also prevented from suing in the the name of the payee for his own use, he will be denied all remedy — a conclusion which never can be tolerated. Whether the endorsee can sustain debt against the maker or not, we will not now further inquire; but in the face of so respectable authority a plaintiff ought never to be driven to the necessity of trying such doubtful experiments. The safe and proper mode to have brought the suit, would have been that adopted in the present case.

But it is contended that the statute of Michigan, which was in force here when this instrument was executed and endorsed, had changed the former law in this particular. That statute makes "all notes in writing" negotiable, and authorizes the endorsee to maintain an action thereon against the makers and endorsers in like manner as in inland bills of exchange, and not otherwise. Now there is much doubt whether this statute is broad enough to embrace sealed instruments; but even if it were, it only authorizes the endorsee to maintain an action "in like manner as in inland bills of exchange, *and not otherwise.*" If at that time, the action of debt would not have lain by the endorsee against the maker, that statute can hardly be con-

sidered as changing the law in this particular, and depriving the endorsee of the privilege of bringing suit in the accustomed form. We therefore conclude that the
*124 law as it existed * at the time this instrument was executed and endorsed, permitted the endorsee to use the name of the payee as the plaintiff in an action against the maker.

But the statute of Iowa, which took effect a few days previous to the institution of this action, not only renders sealed instruments negotiable, but authorizes the endorsee to maintain "the same kind of action" against the maker, as might have been maintained against him by the obligee or payee, in case there had been no assignment of the bond or note, &c. The endorsee could now clearly maintain the action of debt against the obligee or payee, and perhaps on an instrument endorsed subsequently to the passage of that act, the endorsee would be bound to sue in his own name. But not so where the endorsement was made prior to the taking effect of that statute.

It is true that the form in which the action is brought is a matter that pertains to the remedy to a certain extent, rather than to the rights of the parties. This is so much the case, that although an instrument had been assigned prior to the enactment of the Iowa statute, when the law required the assignee to sue in the name of the assignor, still (if the terms of that statute are sufficiently comprehensive) that same assignee might sue in his own name. Yet if he prefers, he may bring suit in the name of the assignor, for such is the implied permission given in the assignment. The law, at the time, entered into the agreement between the endorser and endorsee, and the former thereby authorized the latter to sue the maker in his (the endorser's) name. The subsequent law has not deprived him of this right. We are therefore of the opinion that the endorsee, in the present instance, had a right to sue in the name of Hendershott, for his use, and that the decisions of the Court below were, therefore, correct.

Judgment affirmed, accordingly.

STANNARD *et al.* *v.* MCCARTY.

Error to Van Buren.

Merely selling lands belonging to the United States, where no deception is practiced, is not a fraud upon the purchaser.

The traffic in public lands is not illegal.

*To render a person liable to the penalty of the Act of Congress *125 of March 31, 1830, although the agreement not to bid at the public sales must be *positive*, it need not in all cases be *direct* (v).

It is well settled, that parol proof is admissible to sustain the defence of fraud, or illegality in a contract, though under seal.

In an action of covenant, illegality of consideration cannot be given in evidence under the general issue, but must be specially pleaded.

A judgment will not be disturbed for an erroneous instruction of the Court below, on a point immaterial to the issue.

This was an action of covenant broken, brought on an agreement for the sale of a claim on the public lands of the United States.

The agreement on which the action was brought was as follows:—

"Articles of agreement made and entered into this 19th day of October, 1837, by and between Isaac W. McCarty of the first part, and Wm. Stannard, Obed Stannard, and Luther A. Jones of the second part, witnesseth: that the said party of the first part has sold to the party of the second part all his right, title, interest, and claim to the entire undivided half of the claim on which he now resides, on the west side of the Des Moines river, and in the county of Van Buren, being the same claim on which the town of Rochester is laid off; also, one other claim on the east side of said river, immediately opposite the first mentioned claim, supposed to contain about one hundred acres, for the consideration of twenty-two hundred dollars;

(v) Bowman v. Torr, 3 Iowa, 571.

three hundred and seventy-five dollars to be paid in hand, the receipt whereof is hereby acknowledged; six hundred and twenty-five dollars to be paid on or before the fifteenth day of November next; and twelve hundred dollars to be paid on or before the first day of September next, with the privilege of putting in four horses in the last mentioned payment, at their valuation, any time after the first of March next; the balance which shall remain unpaid on the last mentioned sum is to bear interest at the rate of ten per cent from and after the first day of March next; and the said party of the second part agree to pay the said sums of money as above mentioned. It is understood that the four lots purchased at the sale of lots by the party of the first part are reserved by him from sale, and are not included in this agreement. It is further agreed that the party of the first part, upon receiving the said sum of six hundred and twenty-five dollars, is to make, execute, and deliver to the party of the second part, a quit claim deed for all the interest he has in said claims, as set forth in this agreement.

*126 *"In witness whereof the said parties have hereunto interchangeably set their hands and seals the date above written.

"J. W. McCARTY [SEAL],
"WM. STANNARD [SEAL],
"OBED STANNARD [SEAL],
"LUTHER A. JONES [SEAL].

"19th day of October, 1837.

"In presence of J. W. RANDALL."

The defendants pleaded *non est factum*, and, also, fraud. Judgment for McCarty, the plaintiff below. Thereupon the defendants filed their bill of exceptions, as follows:—

"Be it remembered that on the trial of this cause the counsel for the defendants asked the Court to give the following instructions, to-wit: —

"*First.* That the selling of land belonging to the United States is a fraud upon the purchasers; which instructions the Court refused to give, and charged the jury that such sale would not be fraudulent unless deception were practiced upon the vendee; and to which opinion of the Court the defendants, by their counsel, except.

Second. The counsel for the defendants asked the Court to instruct the jury that if they find that this covenant was made by the defendants for a covenant for a quit claim deed on the part of the plaintiff, for public lands belonging to the United States, the jury must find for the defendants; which instructions the Court refused to give, and to which opinion of the Court the defendants, by their counsel, except.

"*Third.* That if the jury find that the consideration for the covenants made by the plaintiff was, in whole or part, that plaintiff was to convey to the defendants a right to purchase the land at the auction sales of the United States, and the plaintiff sold his right of bidding at the said sales for said land, that the plaintiff cannot recover, and that it is not necessary that this agreement or promise should be in writing; which said instructions were given by the Court, and the Court further instructed the jury that the evidence must prove a direct and positive agreement not to bid for said land; to which opinion the defendants, by their counsel, except.

"*Fourth.* That the agreement between the parties is a concurrent and dependant covenant, and that in order to enable the plaintiff to recover, he must show that he has complied with his part of the agreement or covenant; which instruction the Court refused to give, and to which opinion of the Court the defendants, by their counsel, except, and to all * of the foregoing opinions and *127 instructions of the Court the defendants object and except, and pray that this, their bill of exceptions, may be signed, sealed, and made a part of the record in this case.",

HALL & WOODS, for the plaintiffs in error.

WM. H. STARR & HUMPHREYS, for the defendant in error.

WOODS. This contract was made in contravention of an act of the United States, and is, therefore, void. Laws of the United States, 1830, March 31, sec. 4 and 5; Am. Com. Law, 258.

HUMPHREYS. The action is brought for breach of covenant to convey land. It has been early settled in Pennsylvania that a possessory interest in land is a good consideration. If a person has any interest in land it is a subject of sale. If the plaintiff makes out that the covenant is broken, it is for the defendant to show that the contract was void. That is to be done by direct and positive testimony, and can be done in no other way. There is no evidence of a contract that McCarty shall not bid. The contract is that for a consideration in money Stannard shall convey the possessory interest in the claim.

WM. H. STARR. I cannot agree with my colleague that Congress meant only to impose a penalty for an act; and not to make that act void. Is the contract declared on such a contract as is prohibited in the statute? If it is not, can the Court allow parol evidence to show there was another contract between the parties? Otherwise the Court could not instruct the jury as to any thing not in the contract. The Court alone is to judge if the contract is illegal. The charge was, therefore, not properly asked for. Has this contract any resemblance to such contracts as are referred to by act of Congress? The defendants' counsel asked the Court to instruct the jury that if the contract was to sell his right of bidding at the public sales, it was void; and the Court so instructed the jury. If a person relinquishes his right of bidding at the public sales, this is not such a contract as is prohibited by the law of the United States.

HALL. The property in claims is recognized by the laws of this territory; and is peculiar to the laws of this territory. A claim, in the language of this country, has a judicial existence. McCarty, the plaintiff below, sold to the defendant below a claim. We must look to the law to find a definition of a claim. It is an interest in the public lands arising from possession and improvement. This is the description of property sold by McCarty to the defendant below. On that contract he * brought *128 his action to recover the sum promised for the purchase. What was the consideration or inducement for this promise? It must be something more than the mere possession for twelve or eighteen months, until the land should be brought into market. Fraud vitiates any contract, and so, also, does anything against law or public morals. It was for the jury to decide whether the law had been violated or not. The Court was requested to instruct the jury, and they did instruct them, that if the consideration of the contract was to convey the right of bidding at the sales of public lands, it was void. It is intended by the statute that there shall be a direct and positive agreement. Suppose a person should make an agreement with all having claims that they should be on the Des Moines river on the day of sale; would the Court exclude all evidence to show the object of the agreement, and everything not in the contract itself?

BY THE COURT, MASON, CHIEF JUSTICE. — This was an action of covenant, to which the defendants had pleaded *non infregit conventionem*, and *non est factum*; and, under these pleas, had given notice of fraud as a further defence. Neither by plea nor notice was any mention made of illegality as a ground of defence. On the trial of the cause, several instructions were asked of the Court, which being mostly refused, exceptions were taken, and the case brought up on writ of error.

The first instruction asked was, that the selling of land belonging to the United States was a fraud upon the purchasers — which the Court refused, and charged the jury that such sale would not be fraudulent unless deception were practiced upon the vendees. This is so clearly correct as scarcely to need notice. Such a sale might not constitute a sufficient consideration for a promise, but would not be fraudulent where no fraud was practiced.

The next instruction asked and refused was, that if the jury found this covenant was made for a quit claim deed from the plaintiff below for public lands belonging to the United States, they must find for the defendant. The only particular in which this question differs from that just considered is, that it may be contended that the traffic in public lands is illegal. This subject has been so frequently considered in this Court, that it is unnecessary for us to express our coincidence with the views of the Court below further than by referring to the case of Hill *v.* Smith, decided at the last term of this Court. We have not changed the opinions there expressed.

But the principal point relied upon in this case by
*129 the plaintiffs in *error is, that after the Court below had, in accordance with their request, instructed the jury "that if they found that the consideration for the covenants made by McCarty was, in whole or in part, that he was to convey to the defendants below a right to purchase the land at the auction sales of the United States, and that he sold his right of bidding at the land sales for said land, that he could not recover, and that it was not necessary that this agreement or promise should have been in writing;" the Court further instructed the jury that the evidence must prove a direct and positive agreement. This latter instruction is deemed error.

To sustain themselves in this position, they rely upon the fourth section of the act of Congress, approved March 31, 1830, entitled "An Act for the relief of the purchasers of

public lands, and for the suppression of fraudulent practices at the public sales of the lands of the United States." This section renders it highly penal for any person to bargain, contract, or agree, or who shall attempt to bargain, contract, or agree with any other person not to bid upon the lands, &c. It is a general principal in the construction of statutes, that, in penal laws, nothing is to be taken by implication, but they are to be construed strictly. Still, we think the Court went too far in charging the jury that the agreement must be *direct* and *positive*. Something more than a vague understanding is necessary to render a person liable to the penalty of this statute. Still a positive but indirect agreement would be sufficient for this purpose. The law will not permit itself to be so easily evaded.

For the defendant in error, it was contended that the written agreement between the parties and on which the action was brought, must be the only proof of an illegal contract; that parol proof was inadmissable for this purpose. But this position cannot be sustained. It is well settled that parol proof is admissable to sustain the defence of fraud or illegality in a contract, though under seal. Saunders on Pleading and Evidence, 528, 578.

There is, however, still an obstacle to the reversal of the judgment below. The state of the pleadings did not permit the defence of illegality to be made at all. In an action of assumpsit, fraud or illegality may be given in evidence under the general issue; but the pleas in an action of debt or covenant are not so broad. It is a well established rule, that in an action on a specialty, unless it be void at common law, illegality, to be made available, must be specially pleaded. 1 Saund. 295–6; Chitty on Pleading, 520; Saund. on Pl. and Ev. 576. We *see *130 no good reason for relaxing this rule, which is calculated to develop by the pleadings the true issue to be tried by the jury. The whole of the instructions, therefore, asked or given on the subject of illegality of consideration,

were inapplicable to the legitimate issue then before the jury; and we cannot, of course, reverse a judgment for misdirection of the jury on a mere speculative or immaterial point.

Judgment below affirmed, accordingly.

JOHN MELDRUM *v.* JAMES CLARK.

Error to Des Moines.

Between the parties to an instrument, the date raises a legal presumption of the time of its execution.

Where an instrument, executed by a third person to the defendant, is brought in to defeat the plaintiff's action, and the time of its execution becomes a material fact in the case, the mere date is no evidence of that time.

This was an action of covenant brought in the District Court by Clark against Meldrum, the declaration being as follows: —

"IOWA TERRITORY, } ss.
"DES MOINES COUNTY, }

"*District Court, September Term*, 1839.

"James Clark, plaintiff, by his attorneys, D. Rorer and W. Henry Starr, complains of John Meldrum, defendant, of a plea of covenant broken.

"For that the said defendant, heretofore, to-wit: on the 26th day of January, 1837, to-wit: at the county aforesaid, by his deed of that date, in Court here now ready to be produced, covenanted with the said plaintiff as follows, to-wit:

"'DES MOINES COUNTY, WISCONSIN TERRITORY, }
"'January 26, 1837. }

"'Know all men by these presents, that I, John Meldrum, of the county aforesaid, have this day sold unto James

Clark, of the same county as aforesaid. Now, the condition of the above is such, that the said John Meldrum, for and in consideration of the purchase money of *two *131 certain strips of land, lying on the north side of the quarter section of land that I live on, and on the quarter immediately east of my quarter I live on, described as aforesaid, and running forty-two rods on the north side of the two quarter sections aforesaid (meaning two quarter sections aforesaid); and I, the said John Meldrum, for and in consideration aforesaid, do bind myself, my heirs and assigns, to make a deed in fee simple to the said James Clark, his heirs or assigns, on demand, after I obtain it, if I ever do, by pre-emption or otherwise; and I do further bind myself and heirs and assigns, if I sell my claim, to take a like bond for the benefit of said James Clark, his heirs or assigns. And the said James Clark binds himself to pay said purchase money, or the same amount, to the said Meldrum, his heirs or assigns. In testimony whereof, I, the said Meldrum, have hereunto set my hand and seal, the day and year and month aforesaid.

"'JOHN MELDRUM [SEAL].

"'Signed, sealed, and delivered in presence of

"'JAMES LORTON,

"'AMOS LADD.'"

"Now the said plaintiff avers that the said John Meldrum has sold his claim referred to in his said covenant above recited, to-wit: at the county aforesaid. Yet, nevertheless, the said John Meldrum, defendant, not regarding his said covenant, did not take, nor hath he taken a bond according to his said covenant for the benefit of the said James Clark, his heirs or assigns, although the said James Clark always has been ready and willing, and still is ready and willing to do, submit to, and perform all things on his part covenanted to be done to or for the said defendant by or in consideration of said covenant. And so the said de-

fendant, his covenant aforesaid in this respect has not kept, but has broken the same to the damage of the said plaintiff eight hundred dollars, and therefore he sues."

To this declaration the defendant demurs specially, and sets forth the following causes; viz:—

"*First.* There is no sufficient breach of the covenant alleged.

"*Second.* The bond on which this action is brought contains two distinct covenants, if it contains any, the latter depending for its effect on the breach or performance of the first, and there is no breach of the first condition alleged, nor is the fact negatived that the defendant has not made a fee simple title to the said pieces of land, *132 or that the same was *ever demanded according to the conditions of the covenant, nor is it alleged that said defendant has ever obtained a deed for the same.

"*Third.* Plaintiff has not alledged an offer to perform, on his part, his conditions of the covenant.

"*Fourth.* The bond on which this action is brought, does not contain material covenants to bind both parties."

The demurrer was overruled, and afterwards, at the February term, 1840, a plea of performance was put in. On this plea the jury found for the plaintiff, and his damages at one hundred and and fifty-seven dollars and fifty cents. Thereupon the defendant moved for a trial *de novo*.

1. Because the damages are excessive.
2. The verdict is against law and evidence.

And the motion was overruled and the defendant excepts thereto as follows:—

"Be it remembered, that on the trial of the above cause, which came on to be tried on issue joined on defendant's plea of performance, the defendant offered a bond, taken in his name, for the benefit of said Clark, in evidence to support his plea, bearing date the first day of April, 1839; but

offered no evidence to prove the date which was before the commencement of this suit; the plaintiff contended that the date of the bond was not *prima facie* evidence of its real date, and that the jury might infer that it was executed subsequently to the institution of said suit, notwithstanding the said bond was under seal; and the Court thereupon instructed the jury, the date of the bond was no legal presumption of its real date, and that the jury might infer that said bond has been antedated, although no evidence had been given to prove that said bond had been antedated, and that if the jury should presume from all the circumstances that said bond had been executed since the institution of said suit, that they must find for the plaintiff; to which opinion of the Court the defendant, by his counsel, excepts, &c."

Browning, for plaintiff in error.

Where a note is payable on demand, the demand must be proved to have been made before the action is brought; and on a covenant to make a deed on demand, the demand must, in like manner, be proved. But the proof must not be more extensive than the allegations of the declaration. It must be co-extensive with them. It is necessary for the plaintiff to state all the circumstances of the case that give him a right of action. It would be necessary, *therefore, for him to state that Meldrum had ac- *133 quired a title from the United States, and that Clark had made his demand for a deed, and that Meldrum had refused to convey. There is no compulsion on the government to make a title.

Rorer, for the defendant in error, contended that the bond sued on contains two distinct covenants from Meldrum to Clark: one that he would convey on demand, if he obtained title; the other, that if he sold his claim before he procured title, he would take a like bond from the purchaser for the benefit of Clark.

That on the last named covenant the plaintiff below brings his suit, disregarding entirely the first named covenant, and avers in his declaration that Meldrum did sell without procuring title, which averment negatives the idea that he ever did obtain title to the premises alluded to in the bond. He also, for breach, avers that he did not take of the purchaser a like bond for the benefit of Clark. To this declaration the defendant below demurs, and for cause of demurrer says Clark did not allege a demand of a title before suit. For this demand there could be no necessity in a suit on the covenant to take a bond for the benefit of Clark. Another cause of demurrer assigned is, that the breach is insufficiently stated. As to this point, it is sufficient to say that the breach, as assigned, is co-extensive with the charge as laid in the declaration. And this is all the law requires. At common law, in covenant on a bond, "the plaintiff could assign only one breach of the condition," &c. 1 Ch. Pl. 330. We have no statute changing the law in this respect — hence the assignment of the breach is sufficient.

The counsel of the plaintiff in error, having passed over the other two causes of demurrer by him assigned, it is deemed unnecessary to advert to them further than merely to suggest that, as to Clark's not offering to comply on his part, he had no compliance to make, except to pay the money stipulated when the title should be obtained and a conveyance made to him, of which having been done there is not any pretence.

As to the point raised by the bill of exceptions, there is no proof of any *like bond* with the original having been taken by Meldrum. The exceptions show the bond offered in evidence to have been taken in the *name* of *Meldrum* for the benefit of Clark. Had a like bond been taken, it must have been taken, like the *original*, in the *name* of *Clark*.

The nominal date affixed to the bond offered in evi-

dence under the plea of performance, is not self evidence of its own correctness. And it does not appear that any collateral proof the real date of the bond was introduced on the trial below. Nor does it appear in evidence that *the bond ever came to the knowledge, posses- *134 sion, or control of Clark, so as to enable him to avail himself thereof. As to the statement of the breach, in addition to 1 Ch. Plead. 330, above cited, see *ib.* 325, 326, 327, 328, 329; 6 Cranch, 127; 8 John. 111; 7 John. 376; 2 Hen. & Mun. 446.

In relation to the date of the bond offered in evidence, and the charge embodied in the bill of exceptions, it is obvious that the real date of a deed is the time of its delivery. In this case, the bond referred to is a deed within the meaning of the law; and the date would be from the delivery to Clark, the person beneficially interested, and not to Meldrum; for it could avail Clark but little that a bond for his benefit (nominally) had been taken, if placed beyond his reach and control.

Grimes, for plaintiff in error, in reply. It is no matter whether the bond is in compliance with the statute or not. The only question here is, whether, admitting the bond to be genuine, the date is any presumption of the true date. The original contract does not require that a bond shall be given. It binds him to take a bond for the benefit of Clark, when he shall convey. If a bond should be executed, we don't know that Clark would be entitled to any benefit from it. He would not be entitled to the possession. Swift's Dig. 665.

By the Court, Mason, Chief Justice. — This action was brought upon an instrument containing an alternative covenant. If the defendant below ever obtained title to the lands referred to, he was bound to convey to Clark. If he sold his interest before obtaining such title, he was bound to take from the purchaser a like bond for

Clark's benefit. The latter branch of this covenant was that alone in relation to which there was an alleged breach. In the nature of things, both could not be broken. The breach of either was sufficient to enable the plaintiff below to sustain his action, and the declaration, therefore, in this respect, was sufficient.

The main point in the case, however, is, that in relation to the date of the bond purporting to have been taken by Meldrum from the person to whom he sold, performance has been pleaded, and, to sustain this plea, a bond was offered in evidence, dated anterior to the commencement of the suit. If Meldrum had sold the claim *prior* to the bringing of the suit, and if the bond taken from the vendee was not executed until *afterwards*, it would be no defense to the action whatever. The time of the execution of that bond, therefore, becomes a material fact. And how was that fact proposed to be proved? By the date of the instrument itself, to which Clark was neither party nor privy.

*135 *There is no doubt but that, as between the parties to an instrument, the date raises a legal presumption of the time of its execution. It amounts to a mutual admission in such a shape as to become legal testimony. But to permit the defendant and a third person to make evidence between themselves that shall bind the plaintiff without his consent or knowledge, would be overthrowing one of the fundamental and most salutary rules of evidence.

Suppose the bond had been without date, and that subsequently the parties thereto had, under their hands and seals, executed a separate instrument declaring the bond to have been executed on a particular day, would this have been competent testimony against Clark? If such evidence be admissible, why might not all the evidence in the case be manufactured in the same manner? We can see no reason why a different rule should be applied in

this case, from that which is followed in the proof of any other material fact.

We have no doubt, therefore, of the correctness of the position that, where an instrument executed by a third person to the defendant is brought in to defeat the plaintiff's action, and the time of its execution becomes a material fact in the case, the mere date is no evidence of that time. If objected to, therefore, the bond taken by *Meldrum* should not have been received in evidence at all until proved to have been executed prior to the commencement of the suit. Having been admitted, the charge of the Court was substantially correct. We must understand that charge as applied to the facts of this case, and the import of the language to be somewhat qualified by the other circumstances stated in the bill of exceptions.

It was objected by the defendant in error, that there should have been a tender by Meldrum to Clark; and, also, that the bond should have been taken directly to Clark, but these points need not now be considered, as they could not change the result.

The judgment of the Court below will, therefore, be affirmed.

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*John Pierson *v.* Andrew Steortz. *136

Error to Des Moines.

The rule which excludes testimony in relation to communications made to counsel has never been extended further than to embrace disclosures made to practicing attorneys for obtaining professional advice (*w*).

The exemption must be confined to cases of strict professional intercourse.

To call another "*thieving*" is actionable.

(*w*) See Rev. § 3985; Sample *v.* Frost, 10 Iowa, 266.

John Pierson *v.* Andrew Steortz.

This was an action of trespass on the case, for slander. The declaration alleged that the defendant had uttered the following scandalous and opprobrious words of and to the plaintiff; to-wit: "*You are a dirty, trifling, thieving puppy; you will steal, and the whole set of you*" (meaning the said plaintiff and his family relations). The second count charges the first part of the same words. The third charges the same as the first. The fourth count alleges the defendant to have said, "*I know him from his cradle. He is a thief, and always would steal.*" The fifth charges the words "*he is a thief.*" the defendant pleaded not guilty. Verdict, guilty.

The defendant moved for a new trial for the following reasons: —

"*First.* Because the testimony of William Griffey was improperly admitted to the jury.

"*Second.* Because the Court instructed the jury that the plaintiff was entitled to recover for words spoken in the heat of passion, and on account of provocation from the plaintiff, and refuses to instruct them that in such case the plaintiff was entitled only to nominal damages, if any.

"*Third.* Because the Court instructed the jury that the words, 'you are a dirty, trifling, thieving puppy,' were actionable *per se.*

"*Fourth.* Because the evidence did not support and correspond with the allegations in the third and fourth counts — upon which counts the jury found their verdict.

"*Fifth.* Because the evidence under the fourth count was as follows: 'In May or June last, I was riding with Mr. Pierson toward Augusta. On our way there, Pierson got to talking about what he had lost since he came to this country, and began to talk about losing by Steortz being on his place; and said he is a thief, he had stolen my *137 timber; he always *would steal; he knew him from a boy.' That this evidence does not support said fourth count.

"*Sixth.* Because under the third count the evidence was as follows: 'I was in the timber when Pierson came there. Pierson asked, "Who has cut my timber?"' Steortz replied to him. Pierson then said, 'you are a dirty, trifling, thieving puppy;' and that such evidence does not support the count, and the verdict on this count is contrary to law and evidence.

"*Seventh.* Because after proof that the words were spoken in the heat of passion, or if the defendant had received provocation, if the defendant was speaking of plaintiff's entry and trespass upon his land, that in such case the burden of proof of malace was upon the plaintiff.

"*Eighth.* The verdict was against law and evidence."

Motion for a new trial overruled; and thereupon the defendant excepts to the opinion of the Court.

There was, also, a motion in arrest of judgment for the same causes as the above; and overruled.

On the trial of the cause before the jury in the District Court, William Griffey was called upon to testify, who stated that he was an acting magistrate, and that he usually did the business of the defendant; that Griffey frequently gave advice and council. That Pierson came to him and spoke as follows. And the declarations of Pierson at that time, to Griffey, were called for by the plaintiff. The defendant objected, and his objection was overruled. Whereupon Griffey said, "he came into the office and said he had another troublesome case; that Steortz was cutting and stealing his timber. I advised him to let him alone and not sue him at present."

Grimes, for the plaintiff in error.

Rorer, for the defendant in error.

By the Court, Mason, Chief Justice.— The first point raised in this case is in relation to the admissibility of Grif-

fey's testimony. He was an acting magistrate, and usually did the business of the defendant below, and frequently gave advice and counsel. His testimony was thereupon objected to on account of the confidential nature of the communication made to him by Pierson.

The circumstances of the case as above detailed, would not have justified the exclusion of the testimony. *138 The rule of exemption within *which it is sought to include this case, has never, we believe, been extended further than to embrace disclosures made to practicing attorneys for the purpose of obtaining professional advice. Such a latitude of construction as is now contended for would operate very prejudicially to the public welfare, by affording to crime most important facilities for its consumation, and in many cases an impenetrable shield against detection. It would enable malefactors to plot with impunity, to communicate their nefarious designs, or exhibit their enticements without restraint to every person who will state that he is accustomed to give them counsel and advice. A single glance is sufficient to show the propriety of confining the exemption to cases of strict professional intercourse.

But the testimony of Griffey, as detailed in the bill of exceptions, was applicable to neither of the counts on which the defendant was found guilty, and could, therefore, have had nothing to do with sustaining the action. At the most, it only operated as a circumstance to aggravate the malice of the defendant below in uttering the actionable words. They went to the jury with all the accompanying circumstances. If they believed the words to have been spoken *bona fide*, with the intention of obtaining advice, they did not, of course, regard them as evidence of malice, and therefore gave them no weight.

Another act of the Court below, which forms an alleged ground of error, was the overruling of the motion in arrest of judgment. If the declaration were sufficient to support

the verdict, we see nothing in the reasons on which the motion was founded, nor in the arguments of the counsel, which would justify us in interfering with the judgment already rendered.

The third count is that which is regarded as peculiarly defective. The question of the sufficiency of that count turns principally upon the fact of whether the words "you are a dirty, trifling, thieving puppy," are actionable in themselves. It is contended that the words "thieving" and "thievish," are nearly synonymous. We think otherwise. The former implies action, the latter mere propensity. The mere ungratified inclination to steal, renders one thievish, but he cannot be properly denominated a "thieving puppy," unless practical exercise has been given to that inclination. To call another a sheep-stealing rogue, has been held actionable, 7 Bac. Abr. 297; and we see no substantial distinction between these words and those set forth in the third count. The circumstances under which the words were spoken might have been such as to have justified the conclusion that there was no intention to *charge the actual commission of any crim- *139 inal act, but this is a matter of evidence. The words, unexplained, certainly do contain an accusation of theft, sufficient to sustain the count. As to the word "thieving" being qualified by the other words of the same sentence, that is one circumstance proper to be submitted to the jury, from which the full meaning of the defendant below was to be inferred, but would not of themselves justify this Court in the conclusion that the words were intended, or calculated, to convey a different meaning from their plain literal interpretation.

The motion for a new trial purports to set forth some portions of the evidence given in the Court below. The same is also the case with respect to some of the reasons given to sustain the motion in arrest of judgment. We cannot regard that evidence as coming before us in such a

shape that we can recognize and act upon it. It is true that when the motions were overruled, exceptions were taken in the regular way, and bills duly signed by the judge who tried the cause. But of what facts are those signatures the proper evidence? Merely that the motions were made, grounded on reasons therein set forth, and that they were overruled. In making motions like these, counsel set forth what reasons they see proper. When overruled they have a right to except, and also, to require the judge to sign the bill of exceptions. If that signature is to be a sufficient certificate of the truth of all the statements of the evidence contained in the motion, not only is the rule requiring bills of exceptions to be settled and allowed before the verdict is rendered entirely abrogated, but the council excepting may prepare his own bill and then require the Court to allow it whether its statements are true or false.

We presume that the evidence, as set forth in the motion for a new trial, in the present case, is correctly stated. Even with this admission, we see no substantial error in the proceedings below. The judgment rendered in the District Court will, therefore, be affirmed.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF IOWA.

JANUARY TERM, 1843.*

HON. CHARLES MASON, CHIEF JUSTICE.
" JOSEPH WILLIAMS, } ASSOCIATE JUDGES.
" THOMAS S. WILSON, }

JONATHAN DONNEL *v.* THE UNITED STATES,

Same *v.* Same.

Error to Des Moines.

On an indictment against "*Donald*," verdict and judgment cannot be rendered against *Donnel*, although the names may have nearly the same sound (*x*).

ROBER & WOODS, for plaintiff in error.

H. T. RIED, for defendant.

PER CURIAM, MASON, CHIEF JUSTICE. — Two indictments were found against the plaintiff in error under the
*142 gaming act, in which his name *was written *Donald.*

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*No session was held in 1842.

(*x*) See on this subject, State v. Thompson, 19 Iowa, 299.

To each of these he pleaded in abatement, alleging that his name was Donnel. Demurrers were filed to these pleas, and those demurrers sustained on the ground that the two names were *idem sonans*. This is the principal error complained of.

Courts are not fastidious in enforcing absolute precision in regard to orthography. Names admitting of the same pronunciation are often made up of very different letters. In these cases, a mistake of one mode of spelling for another is unimportant, even in an indictment. The public prosecutor is not bound to ascertain the particular letters used by the accused in writing his name, for this might often be impracticable. But where the orthography of the indictment composes a name which, by the ordinary rules of pronunciation, produces a different sound from the true one, the mistake will be fatal. In the present case, perhaps, the ear would not readily catch the difference in pronunciation, still, the names are very different. Even if it be a fact that the two names are ordinarily pronounced so nearly alike as not to be distinguishable, that is a fact which we cannot judicially know. We think, therefore, the Court erred in deciding that the two names were of the same sound.

The judgment below will, therefore, be reversed.

JAMES SCOTT AND OTHERS, Plaintiffs in Error *v.* THE UNITED STATES, Defendants in Error.

Error to Linn.

A transcript from a justice of the peace, showing a conviction of A B for an assault and battery, is not admissible in bar of a prosecution on an indictment for a riot, although alleged to be the same breach of the peace for which the prisoner stands indicted with others for a riot. A riot is a distinct and different offence (*y*).

A riot cannot be justified to remove a trespasser, even if the rioters have a just right to the possession of the lands trespassed upon.

To constitute a riot, two or more persons should be actually engaged in some physical act of violence.

At the October term, 1840, of the Linn District Court, Prior Scott, John Scott, James Scott, William Dunahoe, Hugh Martin, Joseph Caraway, Robert Osborn, and Elijah Osborn were indicted for riotously *and un- *143
lawfully assembling, and with force and arms assaulting and beating one James W. Willis.

James and John Scott, Caraway, and Dunahoe were tried and convicted. Pending the trial, the defendant's counsel offered to give in evidence to the jury a transcript of a trial and judgment had before a justice of the peace, wherein James Scott was defendant and the United States plaintiff, by which it appeared that the defendant had been tried and fined in the sum of five dollars for an assault and battery. And, also, to prove that said fine was the same assault and battery for which he stood charged in the indictment for a riot. To which the counsel for the prosecution objected, and the objection was sustained by the Court. To which ruling the defendant excepted.

Defendants also offered to prove that the defendants acted in defence of a possession of a "claim" made by

(*y*) State *v.* Green & Mann, 15 Iowa, 289.

one of the parties, and held under the act of the legislature approved January 25, 1839; and that J. W. Willis, the person against whom the offence was committed, was a trespasser upon such claim, and refused to depart on being requested. Whereupon, it was ruled by the Court that actual possession of the public lands of the United States *only* would warrant the defendants in undertaking to drive Willis, and those with him, from the lands in dispute at the time (or so alleged to be), and as the fee simple to the land was in the government, constructive possession, or possession by virtue of the act of the territorial legislature, would not justify them. To which opinion and decision the defendants' counsel excepted.

The defendants' counsel moved the Court to instruct the jury, that the only unlawful acts of violence that the plaintiff could rely upon to convict the defendants must be an assault, or an assault and battery upon the person of James W. Willis, which charge the Court gave, but qualified the same by charging the jury that any act, word, wink, or nod, by which the defendants showed that they encouraged or approbated one of their number in making an actual assault, or assault and battery upon said Willis, would make the actual violence of the one defendant actually committing it, the act of all who thus encouraged or approbated him. To which the defendants' counsel excepted.

Assignment of errors:—

1. The Court below erred in refusing the testimony offered by defendant below, James Scott, to prove that he had been convicted and fined for an assault and battery, which assault and battery was the same offence for which he stood charged.

2. The Court erred in overruling the testimony of-
*144 fered by defendant *below, proving that they acted in defence of a claim held by an act of the territorial legislature, approved January 25, 1839.

3. The Court erred in the instructions given as qualified in the second bill of exceptions; to-wit: that every act, word, wink, or nod by which the defendants showed that they encouraged or approbated one of their number in making an assault or an assault and battery upon Willis, would make the actual violence of the one defendant actually committing it the act of all who thus encouraged or approbated him.

J. O. Hall, for plaintiffs in error.

Ralph P. Lowe, district prosecutor, for defendant in error.

Per Curiam, Mason, Chief Justice. — The plaintiffs in error were indicted in the Court below for a riot. On the trial, their counsel offered in evidence the transcript of a trial and judgment before a justice of the peace, wherein Scott was tried and fined for an assault and battery, and also offered to prove that such trial and fine was for the same offence for which he stands indicted for a riot. This testimony was rejected by the Court. This is the first error assigned.

We think the evidence was properly rejected. No man shall be twice punished for the same offence, but here the second punishment sought to be inflicted is for a different offence. The greater includes the less, and the punishment for a riot would be a defence against a prosecution for an assault and battery, but not *vice versa*. If the rule sought to be established in this case be correct, then downright murder might often escape with the punishment for a mere assault and battery.

Another error assigned is, that the Court charged the jury that actual possession of the public lands *only*, would warrant the defendants in undertaking to drive Willis from the lands alleged to have been in dispute; and, as the fee simple to the lands was in the government, construc-

tive possession, or possession by virtue of the act of the territorial legislature, would not justify them. So far as this instruction has any applicability to this case, it must be understood as deciding that, under the circumstances, the defendants were not justified in using the violence they did in removing those whom they deemed intruders. This is, doubtless, the law, and we go much further in this respect than the Court below has done. For even they would not have been justified in using this violence if they had been absolute owners of the soil.

But the exception chiefly relied on by the plaintiff in error is the charge of the Court, "that any act, word, *145 wink, or nod, by which the *defendants showed that they encouraged or approbated one of their number in making an actual assault, or assault and battery, upon said Willis, would make the actual violence of the one defendant committing it the act of all who thus encouraged or approbated." If by this instruction we are to understand the Court to decide that where one person commits an assault and battery, and others stand by and encourage, without yielding physical aid, the offence becomes a riot under our statute, we think the Court was in error. Our law defines a riot to consist in two or more persons *actually doing an unlawful act with force and violence* against the person or property of another, &c. The rule of construction in relation to penal statutes, which guards against inferential crimes, seems to require that two or more persons should be actally engaged in some physical act of violeuce, to constitute a riot under our statute.

But does the iustruction of the Court admit of such a construction? The jury were charged that those who stood by and encouraged the commission of an offence adopted that offence and made it their own; but it does not appear that they were charged that such adoption transformed an assault and battery into a riot. If Scott, therefore, was engaged with others in a riot (for no evidence is

set forth sufficient to enable us to judge whether he was or not), those who encouraged and abetted became rioters, according to the decision in the District Court. If he was merely committing an assault and battery alone, they became guilty of the same crime as accomplices. This decision is correct.

It is true, we may, with some plausibility, infer from the instruction last mentioned that the Court intended to direct the jury to find the defendants guilty of a riot, if only one of their number committed the actual violence and the others stood by and encouraged; but such is not the necessary, nor even the natural inference. At all events we do not intend to make evidence nor infer facts to strengthen the case of a plaintiff in error. He must make out his own case, and the language of his blil of exceptions will be taken most strongly against himself. The judgment below will, therefore, be affirmed.

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*UNITED STATES, plaintiff in error, *v.* PLATOON *146
LAPOINT AND OTHERS, defendants in error.

Error to Clayton.

In an indictment for false imprisonment, the charge that the defendant was "unlawfully and feloniously imprisoned" implies that the act was done *without sufficient legal authority*, and is good without the latter allegation.

Platoon Lapoint, Charles French, Baptiste Lapoint, George Lasier, and Sapplice Lapoint were indicted by the grand jurors of Clayton county at the District Court of said county, October term, 1840, for "with force and arms in and upon the body of Jacob F. Rebman in the peace of the United States then and there being, an assault did

make, and then and there did unlawfully and feloniously imprison, confine, and detain him, the said Jacob F. Rebman, and him, the said Rebman, did then and there restrain of his liberty, against the peace of the United States, and contrary to the form of the statute," &c.

At the April term 1841, the defendants appeared, and by Churchman, their attorney, moved the Court to quash the indictment, because, —

1. The indictment did not purport to have been found by any grand jury of said county of Clayton, duly impanneled, &c.

2. That said indictment did not specify in what manner Rebman was restrained of liberty.

3. Said indictment did not set forth any offence with sufficient certainty.

4. Said indictment was wholly uncertain and deficient in law, &c.

Which said motion to quash was sustained by the Court.

And the plaintiff, by William J. A. Bradford, district prosecutor for the third judicial district, objected to the opinion of the Court, as in the following bill of exceptions: —

"*First.* For that the Court ordered that the indictment in this case be quashed, because the said indictment did not aver that the restraint and imprisonment therein charged was '*without sufficient legal authority.*' Whereas, the motion to quash did not state any such object there to any such defect, or that said indictment was bad for want of said words.

Second. For that the question of legal authority is a *147 matter *constituting the defence of the defendant;

and that it is sufficient if the indictment show *affirmatively* the facts therein set forth; and it is not necessary the indictment should aver a negative, which could not be a part of the plaintiffs' proof."

Assignment of errors: —

1. The Court quashed the indictment for a ground that was not taken by the defendant in his motion or argument, viz: because the said indictment did not aver that the restraint and imprisonment therein charged was "without sufficient legal authority."

2. The said indictment was quashed for the reason that it did not contain the words "without sufficient legal authority," which it is not necessary that said indictment should have contained, said words being merely negative, and their affirmative constituting matter of defense only.

3. An indictable offence being charged in said indictment, sufficiently explicit to enable the Court to render judgment thereon, it could not be quashed.

Bradford, district prosecutor, cited Roscoe's Crim. Ev. 56; Paley on Conv. 45; Smith's Case, 3 Bur. 1476; Gunning *v.* The State, 1 McCord 573; 5 Pick. 41, &c.

By the Court, Mason, Chief Justice. — The defendants were indicted for the false imprisonment of one Jacob F. Rebman. The statute defines the offense as consisting in an unlawful violation of the personal liberty of another, by confinement or detention *without sufficient legal authority.* The indictment charged the defendants with having unlawfully and feloniously imprisoned, confined and detained the said Rebman, omitting the averment that it was done "without sufficient legal authority." A motion was made to quash the indictment, and sustained on account of the omission.

As a general rule, the indictment, in describing the offense, should follow the language of the statute which defines it.

Where, however, the statute contains an evident tautology, or where several qualifying words or phrases are used, some of which, in signification, include the others, all the terms need not be set forth in the indictment. All that is

necessary is, that the indictment should fully describe the offense. Repetitions, although found in the statute, are unnecessary in the indictment.

In the present case, the act is alleged to have been done *unlawfully*, but there is an omission to state that it *148 was done "without sufficient * legal authority." The expressions are synonymous. We think the Court below, therefore, erred in quashing the indictment, and the judgment below will be reversed.

VALENTINE FAULKNER, appellee, *v.* WM S. CAMPBELL, appellant.

Appeal from Louisa.

A Court of Equity will not enjoin the collection of money on a judgment at law where the defendant there has neglected to make a defense which would have been as available at law as in equity (*z*).

This was a bill in chancery, filed by Valentine Faulkner against William S. Campbell, in the District Court of Louisa county. The complainant states that he, with one Wm. L. McGuire, had executed their joint and several promissory note to the said Campbell, for the sum of $300, which note was the property of Campbell, and in the hands of an attorney for collection. That the note was given for a certain "claim" upon United States' land. That it was agreed that if there was any prior claim, by which complainant should be dispossessed, the contract was to be void and the note to be delivered up, and that there was a written guarantee to that effect, as he was informed,

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(*z*) Confirmatory of this rule, see Kriechbaum *v.* Bridges & Powers, 1 Iowa, 14; Arnold *v.* Grimes & Chapman, 2 Iowa, 1, 7; Houston *v.* Wolcott & Co. 7 Iowa, 173; Shricker *v.* Field, 9 Iowa, 366.

as he could not read or write. That shortly after the contract, Campbell removed from the territory, &c.

The complainant charges that at the time of the contract the defendant knew that one Majors had a valid prior right to said claim; that the consideration had failed, and of course, in equity, the note should be surrendered and cancelled.

Injunction prayed, to injoin the collection of the note from complainant or McGuire.

Subseqnently a petition was filed by complainant, stating that after the filing of the original bill suit had been instituted on said note in Johnson county, and a judgment obtained by default, an injunction was prayed and allowed by the judge.

There was a general demurrer to the original bill, which was *overruled, and at the November term, *149
1840, the injunction was made perpetual by a decree of the Court.

Learned & Woods, for complainant.

Grimes, for defendant.

The Court erred in overruling the general demurrer of the said defendant below to the bill of the said complainant.

Per Curiam, Mason, Chief Justice.— The complainant, having suffered a judgment by default, in an action brought against him by Campbell, upon a promissory note, filed the bill in this case to restrain proceedings at law, for various reasons therein set forth. We do not find it necessary to consider more than a single point: the negligence of the complainant in not making his defense at law. If he had no other means of defense, it was incumbent on him to have filed his bill of discovery, in aid of the suit at law. Where a defendant has lain by, and failed to do so, without sufficient excuse, Courts of equity have always refused to interfere.

David Miller and Valentine Faulkner *v.* Henry L. McGuire.

In the present case, no sufficient excuse is shown by the complainant, for not presenting to the Court at law the very matters of defense which he now urges in his bill; and which, had they been there substantiated, would have been as available at law as in equity. We think, therefore, the demurrer should have been sustained, if presented in such a way as to have been considered at all; and of this, the District Court was the proper judge. At least, no objection having been made on the ground that the record shows the demurrer to have been considered after making a final decree in the cause, without anything to show that the decree had been previously opened, we shall not raise the objection ourselves. The decree of the Court will, therefore, be reversed, the demurrer sustained, and the bill dismissed.

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*150 *DAVID MILLER and VALENTINE FAULKNER, appellees, *v.* HENRY L. McGUIRE, appellant.

Appeal from Lousia.

Where a defendant in a suit at law neglects to plead his legal defense in bar to the action, he cannot make the substance of such defense a ground for the interposition of the Chancery Court, to injoin the collection of the money on said judgment (*a*).

Where the bill alleges new and material testimony, discovered after the trial at law, the substance of that testimony should be set out.

David Miller and Valentine Faulkner filed their bill against Henry L. McGuire, in the District Court of Louisa county. The grounds of complaint were, that McGuire had sold to complainant, Miller, a certain land "claim" for one hundred and fifty dollars, and Miller, with Faulk-

(*a*) See last case and authorities cited in note (*s*).

ner, his security, executed a note for the same, payable 1st March, 1837, and that McGuire at the same time executed to Miller a bond of indemnity against all prior claims. That there was a verbal agreement between Miller and McGuire that if he, Miller, was dispossessed by a prior claimant, that the note was to be cancelled; that this agreement was made when the parties were alone, and that he supposed the bond of indemnity contained this stipulation, as neither of the complainants can read writing, &c. The complainants charge that at the time of sale McGuire knew that one James Erwin had an older and a better right to the claim; that said Erwin lawfully obtained possession of the premises, and that in consequence the consideration of the note had entirely failed; that judgment had been obtained on said note, because the complainants had no adequate defense at law; that since the judgment, testimony not known at the time of trial, had been discovered; that McGuire had removed from the territory, and resided in parts unknown to complainants, and that they were without remedy at law upon the bond of indemnity. Injunction prayed and obtained.

To this bill there was a general demurrer which was overruled; and at the November term, 1840, the injunction was made perpetual, and a decree against the defendant for costs.

The defendant, by attorney, appealed to the Supreme Court.

LEARNED, for complainants.

*GRIMES, for defendant. *151

PER CURIAM, MASON, CHIEF JUSTICE.— This case must follow the fate of Faulkner *v.* Campbell, just decided, and for the same reason. It only differs from that case in one particular. The bill contains, in a general and vague way,

an allegation of newly discovered testimony. This is not sufficient. The newly discovered testimony should have been set forth, that the Court might judge of its materiality. The decree of the Court below will, therefcre, be reversed, the demurrer sustained, and the bill dismissed.

JOHN COCHRAN and CYRUS H. OBER, plaintiffs in error,
v. CRAWFORD GLOVER, defendant in error.

Error to Van Buren.

An assignee of a note may sue in his own name, although only part of the amount be assigned to him,

In actions before justices of the peace, if the sum claimed does not exceed fifty dollars, it is within his jurisdiction.

Crawford Glover sued John Cochran, before a justice of the peace of Van Buren county, on a note of which the following is a copy: —

"Twelve months after date, I promise to pay A. J. Davis, or order, one hundred dollars for value received, to bear interest, after due, at the rate of ten per cent per annum; for the payment of which I bind my heirs, &c., this seventeenth day of January, 1840.

"Keosauqua, I. T.

"A. W. HARLAN [SEAL]."

Upon which note there were the following endorsements; viz: —

"January 27th, 1841. Received, on the within, forty dollars, and interest on the same.

"HENRY GILLY."

"Cr. on the within, ten dollars.

"CRAWFORD GLOVER."

"I assign the within note to B. B. Rew, without any recourse on me.

"A. J. DAVIS."

*"I assign the within note to John Cochran, for value *152 received, this April 20th, 1841.

"B. B REW."

"November 2nd, 1841. I assign sixty dollars of the within to Crawford Glover.

"JOHN COCHRAN."

On the day previous to trial the plaintiff entered a credit on the note for ten dollars. And the justice gave judgment against Cochran for "fifty dollars, with interest and costs of suit until paid, and costs that accrued in the case of Glover against Harlan." Cochran appealed to the District Court, O. H. Ober being security in the bond.

The case was submitted at the September term, 1841, of the District Court, Judge Mason presiding, and a judgment was rendered for the plaintiff against the defendant for the sum of fifty dollars and costs.

The cause is here on a writ of error. Errors assigned:—

1. The plaintiff in the Court below had no right to sue in his own name.

2. The justice of the peace had no jurisdiction.

3. The judgment of the Court below is not good.

Per Curiam, Mason, Chief Justice.—The plaintiff in error seems to rely upon two points:—

1. The plaintiff in the Court below had no right to sue in his own name.

2. The justice of the peace had no jurisdiction.

In regard to the first point, the only ground for an argument arises from the fact that Cochran, in assigning the note to Glover, only assigned sixty dollars thereof. Such

an assignment is, we think, sufficient to render him liable as an endorser to that amount; and that Glover had the same right to sue in his own name as though the assignment had been qualified.

As to the question of jurisdiction, the point has been already settled in this Court in the case of Hall *v.* Biever.*

The judgment of the Court below will therefore be affirmed.

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*153 *Asbury B. Porter and Samuel Brazelton, appellants, *v.* Hosea Moffett, appellee.

Appeal from Henry.

Where there is a dissolution of an injunction, and a demurrer to the bill sustained, the sustaining of the demurrer should not have the effect of dismissing the bill where it contains equity, although it may not be sworn to (*b*).

This was a bill in equity in the District Court, for a new trial at law. The bill stated that Moffatt had brought his action of covenant in the Court of law against the complainants in the bill, who are the appellants in this Court, and that the complainants, not attending Court, and having no attorney present, the said Moffett caused their default to be entered in vacation on the clerk's docket, and recovered judgment thereon at the subsequent term.

A writ of injunction was prayed and granted. The amendment put into said bill states that the reason complainants did not attend Court was, that a compromise

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**Ante*, page 113.

(*b*) This rule affirmed in Massie *v.* Mann, 17 Iowa, 131; and Walters *v.* Fredericks, 11 Iowa, 181.

was pending, and it was understood and agreed that said suit should be drawn. The bill, on motion, was dismissed for want of equity, and the complainants appealed.

At the July term, 1841, the order of the Court below, dismissing the bill, was reversed, and the cause remanded for further hearing.

At the September term of the District Court, the complainants were permitted to withdraw that part of the prayer of their bill which prays that the proceedings at law, asked to be enjoined, be made part of the bill, &c.

The defendant filed a demurrer for want of equity in the amended bill, and that the same was not sworn to, which was sustained. The defendant filed a motion to dissolve the injunction, because the amended bill was not sworn to, and because the complainants could have had a new trial at law, which was sustained, and the complainants again appealed to the Supreme Court.

J. C. Hall, for appellants.

G. W. Teas, for defendant.

*Per Curiam, Mason, Chief Justice.—In this case *154 the defendant filed a motion to dissolve the injunction, and, also, a demurrer to the complainant's bill. Both the motion and the demurrer were sustained. The dissolution of the injunction was correct; the amended bill, which alone presents any grounds for equitable interference, not having been sworn to. But the sustaining of the demurrer, the effect of which would be to dismiss the bill, was erroneous; for, although the bill was not sworn to, it appears to contain equity, and, therefore, ought not to have been dismissed. The case, in fact, is substantially the same as was presented in this very case at the term of this Court held in July, 1841, and must be reversed for the same reason.

Decree set aside, and case remanded to Henry county for further proceedings.

CLAYBOURNE W. HUGHES, plaintiff in error, *v.* JAMES C. MCCUICHEN, defendant in error.

Error to Henry.

Judgment cannot be rendered upon an immaterial issue (*c*).

This was an action of debt, brought by James C. McCutchen against Matthew Spurlock and Claybourne W. Hughes, in the District Court of Henry county, on a note of which the following is a copy: —

"On or before the fifteenth day of next April, we, or either of us, promise to pay, or cause to be paid, unto James C. McCutchen, or order, the just sum of eight hundred dollars for value received of him this 3d January, 1837.

"MATTHEW SPURLOCK [SEAL],
"C. W. HUGHES [SEAL]."

The declaration is in the usual form. Defendants pleaded: 1. *Non est factum;* 2. *Actio non*, because that, after the signing of the note, the said plaintiff, in consideration that defendant, Hughes, would, one month after the said 6th day of June, 1838, pay said plaintiff one half of the amount due on said note, the said plaintiff then and there promised and contracted, to and with the said
*155 defendant, to release him, the *said defendant, from any and all liability on the same. Averment that payment was made accordingly.

3. Plea to the same purport, with an averment that plaintiff received half of the amount as a full satisfaction for the note.

4. Plea, the same to the second count. The plaintiff replied, and the defendants filed a special demurrer to the replication: —

(*c*) Hall *v.* Doran, 6 Iowa, 433.

Claybourne W. Hughes *v.* James C. McCutchen.

1. Because the replication tendered a double issue in this, that said McCutchen did not make the agreement.

2. That Huges did not comply with the agreement.

The defendant, Hughes, withdrew his plea of the general issue, and a jury was empanneled on the issues joined and the special pleas. Verdict for the plaintiff for $350.09 debt, and $33.25 damages.

The defendant then moved in arrest of judgment, for the following reasons:—

1. The issue found by the jury did not warrant the Court in rendering judgment.

2. The issues tried were immaterial issues.

The motion in arrest was overruled, and judgment upon the verdict awarded.

Defendant, Hughes, sued out his writ of error on said judgment, and assigns for error:—

1. That the Court below erred in overruling the motion to arrest the judgment below.

2. The issues tried below are immaterial issues, and on which no judgment could be rendered by the Court.

3. The Court erred in overruling the defendant's demurrer to the plaintiff's replication.

J. C. Hall, for plaintiff in error.

J. B. & G. W. Teas, for defendant in error.

By the Court, Mason, Chief Justice. — The issues joined in this case were immaterial. The promise by McCutchen to receive a part of the debt for the whole, if paid on or before a certain day, was without consideration, and, therefore, *nudum pactum*. But if he actually received a portion of the debt, in *full satisfaction* for the whole, he would be thereby bound. The material fact, therefore, presented as a defence by the second and third pleas, was the receipt of a part of the money in full satisfaction for

the whole; and, if so received, whether it was paid before or after the time previously agreed upon, was *156 *immaterial. The issue joined on the question of time, therefore, determined nothing by which the Court could render judgment, any more than though there had been no verdict at all.

It is contended that this defect cannot be reached in this manner, but that the parties would be bound by the verdict as a penalty for having gone to trial on an immaterial issue. Such a proposition is opposed to both reason and authority. The whole object of a jury trial is to determine some fact which shall be decisive of the merits of the matter in controversy.

To render a judgment of an immaterial fact would be as absurd as to make it dependant upon the direction of the wind at the time. The authorities cited by the counsel for the plaintiff in error, in his argument in reply, show that these views have been entertained and become the settled law of the Courts.

Judgment reversed.

Russell Hotchkiss, plaintiff in error, *v.* Robert B. Thompson, defendant in error.

Error to Van Buren.

Where a note is payable to A B or bearer, it matters not who may be the plaintiff who brings the suit (*d*).

Under the statute allowing the note to be filed in lieu of a declaration, any person holding the note, if payable to bearer, may sue in his own name.

An appearance of defendant to obtain a continuance to traverse the issue of fact, is a waiver of the plea in abatement to the writ.

(*d*) Lane *v.* Krekle, 22 Iowa, 399; Gage *v.* Sharp, 24 Iowa, on page 18.

Russell Hotchkiss *v.* Robert B. Thompson.

This was an action of assumpsit brought by Robert B. Thompson against Russell Hotchkiss, in the District Court of Van Buren county. The plaintiff filed the note in lieu of the declaration, which said note was made payable to R. B. Thompson. The statute under which the plaintiff below proceeded is as follows; viz: "That hereafter it shall be competent for any person or persons, when they wish to institute suit in any of the Courts of Record in this territory (if their demand shall be founded on contract), to file their account, single bill, promissory note, or due bill with the clerk of said Court, whose duty it shall be to issue *process against the defend- *157 ant or defendants in the same manner as if a declaration and precipe had been filed." The note sued upon is in the words and figures following; to-wit:—

"ROCHESTER, Nov. 22, 1841.

"Three months after date, I promise to pay R. B. Thompson, or bearer, fifty-three dollars.

"RUSSELL HOTCHKISS."

Upon the filing of the note, a summons was issued against the defendant below, in which the plaintiff below is named Robert B. Thompson. In the Court below the defendant filed a plea in abatement, setting out that there was a variance between the writ and the declaration, the former naming the plaintiff as Robert B. Thompson, the latter as R. B. Thompson. The defendant below filed with his plea in abatement the plea of the general issue. A demurrer was filed to the plea in abatement, which was sustained. And thereupon the defendant filed his affidavit for a continuance, upon which a continuance was allowed. At the next term, the defendant withdrew his plea of the general issue and suffered judgment to go by *nil dicet.* The sustaining of the demurrer to the plea in abatement is the error assigned. No declaration was filed, the declara-

tion referred to in the plea in abatement was the note itself, which the defendant below calls a declaration.

R. Humphreys, for plaintiff in error.

S. W. Summers, for defendant in error.

By the Court, Wilson, Justice.—The note in this case being payable to R. B. Thompson, *or bearer*, it matters not what may be the name of the plaintiff who brings the suit. The object of the statute above referred to is to allow any person or persons to institute a suit in any of the Courts of Record in this territory, in certain cases, without employing an attorney and without filing a declaration. Any person into whose hands this note might pass would be authorized, under this statute, to commence an action in his own name.

There is, however, another objection to reversing the judgment in this case. If the plaintiff in error relied upon the sustaining by the Court of the demurrer to the plea in abatement, as the ground of error, he should have suffered judgment to be rendered for the plaintiff, upon the overruling the plea in abatement. Instead of so doing he applies for and obtains a continuance in order to have
*158 a trial upon the plea of *the general issue. And by so doing he waived the supposed error of the Court in overruling the plea and cannot now assign it.

Judgment below is affirmed.

James Anderson, plaintiff in error, *v.* Martin Brown, defendant in error.

Error to Des Moines.

It is not a misdescription of a note to state that the defendant, "at Burlington," made, &c., although it does not appear on the face of the note that it was given there.

James Anderson *v.* Martin Brown.

This was an action of assumpsit on a promissory note given by Anderson to Brown, for one hundred and seventy-nine dollars and ninty-six cents. Judgment was rendered at March term, 1842, in the District Court of Des Moines county. Chief Justice Mason presiding.

Anderson, the defendant below, brings the case here by writ of error.

Rorer, for plaintiff in error.

Grimes & Starr, for defendant in error.

By the Court, Mason, Chief Justice.—This was an action brought on the following promissory note:—

"On or before the first day of January next, I promise to pay Martin Brown the sum of one hundred and seventy-six dollars and ninety-six cents, for value received of him.

"July 23, 1842. JAMES ANDERSON."

The declaration commences: "For that, whereas, the said defendant heretofore; to-wit: on the 23d day of July, 1841, at Burlington, in the county aforesaid, made his certain promissory note," &c. The only error assigned is that the declaration sets forth the note as having been made at Burlington, whereas, the copy does not show the place of its execution. If the declaration had stated the note to have been dated at Burlington, it would have been a misdescription, but even then, *agreeably to the decis- *159
ion in Walker & Eno *v.* Ayers, decided at this term of the Court, no advantage could have been taken of the variance except by special demurrer, inasmuch as the copy seems to be correct. At all events there is nothing to show a varience between the copy and the original note.

But in the present case there is no misdescription which even a special demurrer would have reached. The declara-

tion states that the note was executed at Burlington, and what is there to show that such was not the fact? It is true the notes does not, on its face, purport to have been executed there, but the declaration made no allegation of that kind. There is no variance, and the judgment below will be affirmed.

Judgment affirmed.

D. W. MATTHEWS, assignee of J. W. Woods, plaintiff in error, *v.* GEORGE A. TALLY and WILLIAM S. TALLY, defendants in error.

Error to Henry.

The Court will refuse to hear proof of any oral agreement between the contending counsellors to treat the pleadings as amended, when they are not, and to show an issue different from that presented by the pleadings on file.

This was an action of debt, brought by D. W. Matthews, assignee of James Weston Woods, against William S. Tally and George A. Tally, upon a promissory note for fifty dollars. The cause was tried at March term, 1842, before Judge Mason and a jury, and a verdict and judgment for defendant. The grounds relied upon by Matthews, plaintiff in error, to reverse the judgment below are embraced in the opinion of the Court.

HALL & WOODS, for plaintiff in error.

G. W. TEAS, for defendant in error.

PER CURIAM, MASON, CHIEF JUSTICE.— The record in this case appears very loosely made up, either from the neglect

of the clerk or attorneys. The defendant pleaded three pleas, one of *non est factum*, *and two of accord *160 and satisfaction. To the first plea there was a joinder in issue. The second plea was demurred to, the demurrer sustained, and the defendant ruled to plead anew, which does not appear ever to have been done. To the third plea there was a replication. This was demurred to, and the demurrer sustained. The record then states that the plaintiff amended his replication (without stating wherein or how), and issues being joined, thereupon came a jury, &c. As the demurrer to the replication was special, the amendment will be presumed to be merely as to formal defects, leaving the substance of the replication as it was originally.

It appears from the bill of exceptions that the plaintiff's attorney contended that there was a verbal agreement between him and the attorney for the defendants by which it would seem the old replication to the third plea, to which the demurrer had been sustained, was permitted to remain, with a verbal agreement between the attorneys, that the said replication should be regarded on the trial as traversing the entire plea. An affidavit to that effect was also filed by the plaintiff's attorney, upon which he moved for a new trial. The Court, it appears, on the motion for a new trial, refused to hear evidence of the parol agreement of the attorneys, which, as alleged, was made a substitute for the amended replication above mentioned, which appears to be the burden of the errors assigned in the case.

In all this there is no error. On these subjects the District Courts have a right to establish their own rules, and it certainly would be a very proper one to refuse to hear proof of any verbal agreement between attorneys, which went to vary the effect of a pleading as set forth upon the record.

The record shows no error of any kind, that we percive. The only errors urged in the argument are those of omis-

sion. But if parties will go to trial without a comple record, it will require a stronger case than the present to induce this Court to disturb the verdict rendercd thereupon.

Judgment affirmed.

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*161 *JAMES DAVIS and STEPHEN WHICHER, JR., plaintiffs in error, *v.* COMMISSIONERS OF MUSCATINE COUNTY.

Error to Muscatine.

A fund arising from the sale of lands, pre-empted for seats of justice, is a trust fund to be specially applied to the purposes contemplated in the grant, and is not subject to the ordinary drafts upon the county treasury.

This suit was originally brought before a justice of the peace, for Muscatine county, on a note, of which the following is a copy:—

"Thirty days after date we promise to pay the commissioners of Muscatine the sum of twenty-five dollars, with twenty per cent interest from date, July 14, 1840.

"JAMES DAVIS,
"STEPHEN WHICHER, JR."

Summons was served upon Davis, and a judgment against him by default, July 19, 1841, for $25.00 and $5.00 interest and costs.

The cause was removed to the District Court by *certiorari*, and at the December term, 1841, the cause came on for hearing, and the parties waived a trial by jury and consented that the Court should try the cause, on the following proofs and concessions:—

"It is conceded by the plaintiffs' attorney, that Stephen Whicher, Jr. signed the note as security. It is conceded

by the defendant, that the claim of the plaintiffs is a legal one, and it is proved by Edward E. Fay, the clerk of plaintiffs' court, that the debt was contracted for, and on account of funds arising from the sale of lands and lots, pre-empted by the plaintiffs, under an act of Congress, entitled 'An Act granting to the counties or parishes of each state and territory of the United States in which public lands are situated, the rights of pre-emption to quarter sections of land, for seats of justice within the same,' approved May 26, 1824. It is contended by the defendant that he should be allowed the right of set-off, as follows:—

"'*The Commissioners of Muscatine County*,

"'To James Davis, Dr.

"'To this amount due me on your order on the county *treasury of this county, dated *162
Jan. 23, 1841, No. 461..... $37 50
"'Ditto, dated Oct. 1, 1841, No. 481 (part of)..... 12 45'

"Of which due notice was given by the defendant, and it is proved by the testimony of H. Musgrave, the treasurer of the plaintiffs, that there has been no funds in the treasury, since the date of said orders, wherewith to pay the same, and there rests his defence."

It was agreed further, that if the said set-off was legitimate and appropriate, the judgment should be for the defendant, otherwise for the plaintiff. Judgment was rendered for the plaintiff for $30.90 and costs.

The defendant sued out a writ of error from this Court. And the said plaintiffs in error, by Whicher, their attorney, come and say that in the rendition of the judgment aforesaid there is manifest error, in this, to-wit:—

1. The judgment should have been rendered for the plaintiffs in error, and against the defendants in error, and not in favor of defendants in error against the plaintiffs in error.

WHICHER, for plaintiffs in error.

LOWE, for defendants in error.

PER CURIAM, WILSON, JUSTICE.—The act of Congress relied upon by the defense sets forth, that there be granted to the several counties or parishes of each state and territory of the United States, where there are public lands, at the minimum price, for which public lands of the United States are sold, the right of pre-emption to one quarter section of land in each of the counties or parishes of said states and territories, in trust for said counties or parishes, respectively, for the establishment of the seat of justice therein: *Provided*, the proceeds of the sale of each of said quarter sections shall be appropriated for the purpose of erecting public buildings in the county or parish, for which it is located, after deducting therefrom the amount originally paid for the same. *And provided, further*, that the seat of justice for said counties or parishes, respectively, shall be fixed previously to a sale of the adjoining lands within the county or parish for which the same is located. Act of Congress, approved May 26, 1824.

This act grants to the counties the right of pre-emption to one quarter section upon the express condition, to-wit: that the proceeds of the sale of said quarter sections shall be appropriated for the purpose of erecting public buildings in the county, &c.

*163 *The counties availing themselves of this right become trustees of the fund, and are bound to carry out the trust which is undertaken. They take the grant upon the condition specified, and no act of the counties, or of the board of county commissioners (their agents and representatives of the counties in fiscal transactions) could divest them of the liability to perform the trust, or divert this fund from the object to which the grantor and grantee intended it; much less can individuals do so.

It is admitted by the plaintiffs in error that the debt was

contracted for and on account of funds arising from the sale of lands pre-empted under the act of Congress referred to. Now if the plaintiffs in error can be allowed to set off county orders, which are issued to pay the usual expenses of the county; for instance, for the payment of the per diem allowance of the commissioners, or their clerk, or that of the sheriff for attending Court, it would put it out of their power to appropriate the fund to the objects for which those orders were issued, and thus wholly defeat the object of the grant. The case cited by the counsel for the plaintiffs in error, Bank of the Metropolis *v.* The United States, Peters R., to sustain the position that neither corporations nor individuals can divide their funds into classes and appropriate them to particular objects to the injury of their creditors; and that though the United States have various departments of government to the support of which funds are appropriated, yet where an action is brought in a Court of law, to recover an amount due by the defendant for moneys received on account of any part of the judiciary fund, a set-off may be pleaded for moneys expended by defendant in the military, navy, post office, or any other department, will not sustain the position assumed by him in this case. That doctrine, so far as it applies to funds received by them, where no trust is created, or it may apply to the government where funds are received through the ordinary channels of revenue, and which consequently came into the treasury without specific appropriation to any particular object, but there is nothing in that case which would warrant the inference that the government of the United States could not receive from individuals or corporations, a fund for a particular object, or that after receiving it, that the object of the donor or grantor could be defeated by persons having claims upon the treasury, wholly unconnected with the subject of the trust. Will it be contended, that if the money arising from the bequest of Smithson, of London, for the purpose

of founding at Washington City the Smithsonian Institution, should be invested as Congress have directed, in State stocks, until provision be made by law for carrying *164 the purpose of the bequest *into effect, that it could be taken to pay the debts of individual creditors of the government?

The principles at law which apply to cases where a trust is created for the benefit of individuals, apply to this case. In these cases it has never been contended that the indebtedness of the person who is to be benefited by the trust could be made the means of defeating the trust; but on the contrary, in most cases the insolvency of the person thus to be benefited by it, or the apprehension of such insolvency, is in most cases the reason for creating the trust. To permit the object of the grant to be defeated in this way, would be virtually saying that the grantor shall not do what he will with his own.

We think the decision of the Court below, not allowing the set-off, was correct.

Judgment below affirmed.

THE UNITED STATES, plaintiff in error, *v.* JOHN ROSS, defendant in error.

Error to Jefferson.

The district attorney on an indictment for obtaining property under false pretenses, is not required to file specifications of the false pretenses used by the person accused.

The defendant, John Ross, was indicted at the District Court of Jefferson county, at the September term, 1841, for knowingly and designingly, by false pretenses, obtaining from one Walter Dillon a certain promissory note, for

the payment of eight hundred dollars and fifty cents, with the intent to cheat and defraud the said Dillon.

At the April term, 1842, the defendant, by C. Olney, his attorney, filed a general demurrer, which was overruled.

The defendant then, by Olney and Chapman, his attorneys, stated to the Court that they did not feel safe in the defense of the said defendant, without knowing specifically the false pretenses upon which the defendant was to be tried; and thereupon the defendant, by his said attorneys, *moved the Court that the prosecutor file *165 full and distinct specifications of the false pretenses used by the defendant.

The Court ordered the filing of the specifications prior to the introduction of testimony to prove the false pretenses, to which the district prosecutor took exceptions.

Assignment of errors: —

1. The Court below erred in ordering the district prosecutor to file specifications of the fale pretenses used by the defendant, in addition to the charges and specifications contained in the indictment.

2. In refusing to admit testimony to go to the jury to prove the false pretenses by which the note which the defendant is charged in the indictment with having obtained by false pretenses, was obtained.

H. T. Reid, for plaintiff in error.

J. C. Hall, for defendant.

Per Curiam, Williams, Justice.—This indictment is framed under the ninty-fourth section of the criminal law (Iowa Laws, Vol. 1. page 169), which sets forth that, "if any person or persons shall knowingly and designedly, by any false pretense or pretenses, obtain from any other person any chose in action, money, goods, wares, &c., with

intent to cheat or defraud any such person of the same, every person so offending shall be deemed a cheat, and upon conviction," &c.

The indictment in this case was insufficient, because the false pretense, being the gist of the offense, should have been particularly set forth, in order that the defendant might be apprised of the accusation, and be enabled to prepare his defense. But as the overruling of the demurrer to the indictment was not excepted at the time, by the defendant, and incorporated in a bill of exceptions, this Court will not set aside the proceedings for that error. We will then proceed to consider whether the Court below erred in ordering the district prosecutor to file specifications of the false pretenses used by the defendant in addition to the charges and specifications contained in the indictment. The section of the statute relied upon by the defendant in error, as giving the Court authority to make such an order, is as follows: "The body of an indictment shall be considered as made up of charges and specifications, and no indictment shall be quashed if any indictable offense is clearly charged therein, nor shall any motion be entertained with a view to arrest, reverse, *166 or set aside any judgment on account of *a defect in the indictment, if the charge upon which the offender was tried be so explicitly set forth that judgment can be rendered thereon."

We see nothing in this section which would authorize the Court to make this order Nothing can be considered as a part of the body of an indictment which is not set forth in the indictment itself. To authorize the district prosecutor to make specifications after a defendant has pleaded to an indictment, which specifications are to be considered as a part of the body of the indictment, would seem to us a very unusual procedure, and one which might, in most instances, operate to the prejudice of the rights of the accused, by making new allegations which he would

not be prepared to meet, which would thus take him by surprise. The Court below seems to have considered the word "charge" as synonymous with crime, and that if the indictment merely set forth that the grand jurors of the county of Jefferson find that A B is guilty of murder, or arson, that the crime of murder being explicitly set forth, that such indictment would be sufficient. We consider the word "*charge*" as synonymous with accusation, which, while it includes a crime in legal contemplation, also includes circumstances to a reasonable extent.

That the legislature intended to require that the indictment should set forth something more than the crime, is evident from the first part of the section, where it is said that "the body of the indictment shall be considered as made up of charges and specifications." That there are apparent inconsistencies in this section, and that it is somewhat obscure in some of its parts, is admitted, but as the course insisted upon by the counsel for the defendant in error is without a precedent, and as the statute does not require it, we do not feel disposed to adopt it where the consequences might so materially affect the right of defendants.

The decision of the Court below, requiring the prosecutor to file specifications, is reversed, and this cause is remanded to the Court below, with directions to proceed upon the indictment.

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*Ansel Humphreys *v.* J. Bridgman, & Co. *167

Error to Muscatine.

The defendant, under the general issue and notice of payment, in an action of assumpsit for goods, &c., is not bound to furnish the plaintiff with a bill of particulars (*e*).

(*e*) Under the Revision a bill of particulars must, in such case, be annexed to the pleading. Rev. § 2018.

Ansel Humphreys *v.* J. Bridgman & Co.

This was an action of assumpsit for goods sold and delivered by Bridgman & Co., to Humphreys. Plea, general issue, and notice of payment.

Verdict and judgment for sixty-two dollars and forty-one cents, at the June term, 1842.

Motion for a new trial, for reason that the verdict was contrary to the evidence and for misdirection of the Court in matters of law, overruled.

From the bill of exceptions taken in this cause, it appears that on the trial the defendant offered evidence tending to prove payment subsequent to the date of the last item in the plaintiff's account. This evidence the Court ruled could not be given to the jury under defendant's plea.

This is the only ground of error assigned by Humphreys, plaintiff in error.

W. G. Woodward, for plaintiff in error.

The evidence offered by defendant below should have been admitted under the plea, or the notice, *either* of them. The notice is a general one of payment of the demand sued, and any evidence tending to show it should have been admitted. But if there be any objection to the notice, still payment may be given under the general issue. 3 John. Dig. 459, S. 111, 113; Citing 7 Wend. 194; 10 W. 202; do. do. 471, S. 343; Citing 4 Cow. 173; 13 Petersdorff Ab. 249; N. Ld. Lay 787; 7 Com. L. R. 368; N. Citing 2 Camp. 558; Wright's Rep. 219, 735; 1 Chit. Pl. 513, late edition.

Such was the standing English doctrine until the adoption of the new rules under George IV.

R. P. Lowe, for defendant.

The counsel for plaintiff in error has quoted a number of authorities to prove that in an action of assumpsit pay-

ment may be given in evidence under the general issue. This doctrine was not, and is not, denied. The opinion of the Court below was founded upon the peculiar *character of the 10th sect. 372, of our Practice Act. *168 The defendant below pleaded the general issue and under it gave special notice of payment, &c. Was not the plaintiff below entitled to a bill of particulars, stating the mode of payment, the time when, the amount, and whether it was for the bill of goods, the price of what was sued for? It seems, if the section alluded to means anything, it makes this requsition: where the demand or payment of the defendant is narrowed down to a point, by a special notice under the general issue, it is not only right but incumbent on him to furnish his opponent with a bill of particulars, that he may be advised in due time before trial, of the nature of the payment. The payment might have been for other goods purchased at the same store, or it might have been for some other consideration. Now the defendant, himself, has placed the pleadings in a condition that makes it necessary for him to file a bill of particulars. He must take the consequences of his own act. If the Court will undertake to draw the line between the cases where they will, and where they will not, require bills of particulars, much difficulty must arise. The statute says in all cases it must be done.

Woodward, in reply: —

The plea or notice of payment is a bill of particulars *per se*. It is payment of the demand sued, and cannot be of any other. Defendants below did not set up any demands against the other party but a payment of plaintiff's demands, and certainly no bill of particulars is necessary for any matter which may be given under the general issue.

Per Curiam, Mason, Chief Justice.— The defendants in error admit the doctrine, that in the action of assumpsit

payment may be given in evidence under the plea of the general issue. Upon this point see the numerous authorities cited by the counsel for the plaintiff in error, and also, 1 Chitty Pl. 419; 4 Taunt. 165; Saund. on P. & E. vol. 2 p. 272. But they contend that the tenth sec. of the Practice Act, Iowa Laws, vol. 1, page 372, required the plaintiffs in error to file a bill of items, stating the mode of payment, the time when, the amount, &c., in order to authorize the admission of testimany tending to prove a payment. This section is as follows:—

"The several Districts Courts shall have power, in any action pending before them, upon motion, and good and sufficient cause shown, and reasonable notice thereof given, to require the parties, or either of them, to produce books or writing, in their possession or power, which contain evidence pertinent to the issue, and it shall be the duty
*169 of the defendant or *defendants, in all cases when he, she, or they intend to prove on trial any account or demand against the plaintiff, or plaintiffs, to file with his plea a bill of the particular items of such accounts or demands, and no other accounts or demands shall be suffered to be proved to the jury or Court, on that trial."

We find nothing in this section which would entitle the plaintiff in error to a bill of items, where the defendants, in the District Court, intend to prove on trial any "accounts or demands against the plaintiff." A payment to a merchant upon his bill, by a debtor, is neither an account nor demand; it is not a set-off, and it is only to such accounts or demands as are intended to be relied upon as a set-off, that the statute refers; and the common law doctrine, admitting evidence of payment under the general issue in assumpsit, is not varied by it.

We think that the Court erred in rejecting the testimony. The judgment of the Court below is reversed, and remanded for further proceedings.

MARTIN HARLESS and JOHN B. ADAMS, plaintiffs in error, *v.* THE UNITED STATES, defendant.

Error to Johnson.

An indictment for betting on a horse-race cannot be sustained under the act against gaming. Horse-racing is not a game of chance (*f*).

A residence of six months in the territory entitles a person to sit as a grand juror, although he may have resided a portion of that time in the Indian territory.

At the November term, 1841, of the District Court of Johnson county, Martin Harless and John B. Adams were indicted for unlawfully betting, one with the other; to-wit: The said Martin Harless bet a mare against a horse, bet by the said John B. Adams, on the event of a certain horse-race, at the county aforesaid, on the 31st of July, 1841, then and there run between the said Martin Harless' horse and the Freelan & Co.'s mare, the said Adams winning the bet, &c.

At the May term, 1842, the defendants appeared and moved the Court to quash the indictment on the following grounds: —

*1. That said indictment did not charge against *170 said defendants any crime or misdemeanor under the law of this territory, or the laws of the United States.

2. That the statute under which the defendants were indicted was repealed.

The motion to quash was overruled. The defendants, then, by Bates, Harrison, and Folsom, their attorneys, filed their plea in abatement and prayed judgment, because Levi Colton, one of the grand jurors who found the indictment, was not a qualified elector of the territory, for

(*f*) But playing for liquor, the loser to pay for the drinks, is gambling within § 4411 of the Revision. The State *v.* Maurer, 7 Iowa, 406.

the reason that said Colton had not lived and resided in said territory six months immediately previous to the finding of said indictment.

To this plea Carleton, prosecuting attorney, replied that said Levi Colton was a qualified elector at the time of finding the indictment.

It was then agreed between the prosecuting attorney and the defendant's counsel that the issue of qualification should be submitted to the Court. It was proved that the said Colton had resided for two years immediately preceding his selection as a grand juror, about twenty-five miles west of Iowa City, the county seat of Johnson county, in the territory of Iowa, and on the lands belonging to the Indians, but within the limits prescribed by the act of Congress as constituting the boundary of the territory of Iowa, with the exception of about five and a half months immediately preceding his selection as a grand juror, during which time he had resided in Johnson county. To this testimony the counsel for the prosecution demurred, as not being sufficient to sustain the plea in abatement, and prayed judgment. The demurrer to the evidence was sustained, and the defendants required to answer over to the indictment. The defendants then pleaded not guilty, went to trial, were found guilty, and fined ten dollars each.

To reverse this judgment the defendants below have brought their writ of error, and assign for error: —

1. Said Court erred in overruling said motion to quash said indictment.

2. The Court ought to have sustained said defendant's plea in abatement.

3. The said Court ought not to have sustained said plaintiff's demurrer to the evidence.

4. Said indictment charged no offense against said defendants, indictable by the laws of this territory.

*171 *Bates & Harrison, for plaintiffs in error.

J. P. CARLETON, for defendant.

PER CURIAM, MASON, CHIEF JUSTICE. — We shall first consider whether the Court erred in sustaining the demurrer to the evidence given to sustain the plea in abatement. Was Colton a qualified grand juror? He had resided in Johnson county less than six months, but he had lived for about two years in the Indian country, within the limits of the territory, as prescribed by the act of Congress.

The statute renders him a good grand juror if he was a qualified elector. Laws of 1838 and 1839, page 277. To be qualified as an elector, he must have resided in the territory at least six months immediately previous to his application to vote. Page 188, same volume. Is a residence in the Indian country, under such circumstances, a residence *in this territory*, within the meaning of the statute? We think it is.

It seemed to be assumed in the argument that his residence in the Indian country had been illegal, and that, therefore, he ought not to acquire a legal privilege through a violation of the law. But what evidence have we that his residence there was unlawful? The territory of Iowa extends to the limits fixed by the act of Congress, and is not confined to that portion to which the Indian title had been extinguished. Six months residence within the territory immediately previous to, and an actual residence in the county at the time of, his selection and service, constituted him a legal grand juror, so far as residence is concerned.

A more substantial objection is set forth in the fourth assignment of errors, that no indictable offense is charged in the indictment. Is betting on a horse-race indictable under our gaming act?

Two positions are taken by the counsel for the defendant in error to sustain the affirmative of this question: 1. That all betting is indictable under that act. 2. That horse-racing is a game of chance.

The fourth section of the act provides that "every person who shall bet any money or property, or play at or upon any gaming table, bank, or device, prohibited by the preceding section, or who shall bet upon or play at any game played at or by means of any such gaming table, &c., shall, on conviction thereof, be adjudged guilty," &c. It is contended that every person who shall bet any money or property, on any occasion, is rendered liable to the penalty, and that this phrase in relation to betting is entirely independent of the words which immediately follow.

If every person who shall, on any occasion, bet any
*172 money or *property, is liable under this statute, the second branch of the section, "*or who shall bet upon* or play at," &c., is clearly superfluous so far as relates to betting.

The title of the act is, "An Act to prevent and punish gambling," and the whole scope and object of the statute seems to be to prevent and punish games of chance, or, at least, all betting and staking money thereon. If it had been the intention of the legislature to have prohibited all betting in such a statute, would they not have used more unequivocal language? In lugging in such a provision by the head and shoulders, they would certainly have spoken so as not to have been misunderstood.

Now, the first branch of the section in question, when interpreted by the rules ordinarily applied to legislative language, is so far from having an *evident* meaning like that put upon it by the counsel for the defendant in error, conveys, we think, an evident signification to the contrary. It should be construed as though it read, "every person who shall bet any money or property *upon* or play *at* any gaming table," &c. In fact, that form of expression is used in the second branch of the section, which reads, "or who shall bet *upon* or play *at* any game," &c. This second branch is merely a variation of the first, such as is frequently used in legal enactments for greater certainty.

The first, prohibiting betting or playing at or upon any gaming table, &c., and the second contains a prohibition against betting upon or playing at the game itself. The language of the second clause, therefore, throws light upon the meaning of the first, and renders it evident that all kinds of betting are not reached by this statute.

But it is contended that horse-racing is a game of chance, and that, therefore, the case is brought within the statute. The argument used in this case, if sound, would prove that, perhaps every uncertain event was a game of chance. Not only would every *game* be of this description, but all the uncertainties with which this world is crowded become games of chance. If this was the view of the legislature, why did they not use different language? If they intended to include in one sweeping phrase everything but mathematical calculations (for everything else is more or less mixed up with uncertainties), they certainly used most extraordinary language.

Penal statutes must not be construed to embrace cases not clearly within their provision. The word *game* does not embrace all uncertain events, nor does the expression "*games of chance*" embrace all *games.* As generally understood, games are of two kinds, games of *chance *173 and games of skill. Besides, there are trials of strength, trials of speed, and various other uncertainties which are perhaps no games at all, certainly they are not *games of chance.* Among this class may be ranked a *horse-race.* It is as much a game for two persons to strive which can raise the heaviest weight, or live the longest under water, as it is to test the speed of two horses.

It is said that a horse-race is not only uncertain in its result, but is often dependent upon accident. So is almost every transaction of human life, but this does not render them games of chance. There is a wide difference between *chance* and *accident.* The one is the intervention of some unlooked for circumstance to prevent an expected

result, the other is the uncalculated effect of mere luck. The shot discharged at random strikes its object by chance; that which is turned aside from its well directed aim by some unforseen circumstance misses its mark by accident. In this case, therefore, we reasonably feel disappointed, but not in the other, for blind uncertainty is the chief element of chance. In fact, pure chance consists in the entire absence of all the means of calculating results; accident, in the unusual prevention of an effect naturally resulting from the means employed. That the fleetest horse sometimes stumbles in the race-course and leaves the victory to its more fortunate antagonist, is the result of accident, but the gambler, whose success depends upon the turn of the cards or the throwing of the dice, trusts his fortune to chance.

It is said that there are strictly few or no games of chance, but that skill enters as a very material element in most or all of them. This, however, does not prevent them from being games of chance within the meaning of the law. There are many games, the result of which depends entirely upon skill. Chance is in no wise resorted to therein. Such games are not prohibited by the statute. But there are other games which, although they call for the exercise of much skill, still there is an intermingling of chance. The result depends, in a very considerable degree, upon sheer hazard. These are the games against which the statute is directed, and horse-racing is not included in that class. We think, therefore, the indictment in this case charged no indictable offense against the defendants below, and that the judgment below should therefore be reversed, which is accordingly done.

*THOMAS HOUSTON, plaintiff in error *v.* THE *174
UNITED STATES, defendant in error.

Same *v.* Same.

Error to Washington.

A person recognized to appear at the District Court to answer, &c., is subject to the costs of the recognizance, although no prosecutor appears (*g*).

The defendant in error was bound over in two cases to keep the peace, and to appear at the next term of the District Court of Washington county, on the complaint of Henry C. Mott, for threatening to shoot said Mott, &c. At the June term, 1842, Houston appeared in Court, by his attorney, but Mott, the prosecuting witness, failed to make his appearance, nor did any other witness appear to have said Houston continued under recognizance. Thereupon the Court ordered Houston to be discharged from his recognizance, and that he pay the costs of the proceeding, and judgment was rendered accordingly. For this, the defendant below seeks to reverse the judgment.

BATES & HARRISON, for plaintiff in error, assign:—

1. The Court ought not to have rendered judgment against said defendant, when he was discharged, and the prosecuting witness did not appear against him.
2. The Court erred in rendering judgment for costs against said defendant.
3. The Court should have proceeded to investigate the matter by hearing testimony, or else discharged the defendant without costs.
4. And from other errors appearing from the papers and proceedings.

(*g*) See Gribble *v.* The state of Iowa, 3 Iowa, 217; Rev. §4466.

J. P. CARLETON, for the United States.

BY THE COURT, MASON, CHIEF JUSTICE.—The plaintiff in error was bound over in two cases to keep the peace, and appear at the next term of the District Court of Washington county. He appeared accordingly, and no prosecutor appearing against him, he was discharged upon payment of costs. His counsel contends that the judgment
*175 for *costs against him, was erroneous, and that the District Court had no power, without an investigation, to render such judgment. We think otherwise. The District Court had a right to presume that the plaintiff in error had been justly bound over by the justice of the peace. If so, he ought to pay the costs of the proceeding. The prosecutor was not bound to appear at the District Court, unless he wished the recognizance to be continued. We see no error below, and the judgment will, therefore, be affirmed.

BENJAMIN ZICKAFOSSE, plaintiff in error, *v.* ABRAHAM HULICK, defendant in error.

Error to Washington.

A parol contract for the sale of improvements upon public lands is valid, and is not such an interest in lands as the statute of Frauds and Perjuries contemplates (*h*).

This was an action of assumpsit upon promises, instituted by Abraham Hulick against Benjamin Zickafosse, in the District Court of Washington county.

The declaration sets forth, that the defendant, in the year 1839, promised to pay the plaintiff $150, for one

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(*h*) To the same effect is the case of Bryant *v.* Hendricks, 5 Iowa, 256.

moiety, or thereabouts, of a certain "claim," situated in the counties of Washington and Henry, then in the possession of, and belonging to the plaintiff, with an averment that possession was given to the defendant, &c.

Plea, general issue, and notice to introduce evidence of, 1, failure of consideration; 2, set-off; 3, money had and received, &c.

At the November term, 1841, the case was submitted to a jury, and on the trial, the plaintiff introduced a witness to prove a parol contract for the sale of the claim from the plaintiff to defendant, referred to in the declaration, which contract was never reduced to writing, nor the promise on which the plaintiff sought to recover ever reduced to writing.

The defendant objected to the introduction of the evidence, on the ground that a claim was an interest in land within the meaning of the statute of frauds. Which objection was overruled by the Court, and the *tes- *176 timony permitted to go to the jury. To which opinion of the Court the defendant excepted.

Verdict and judgment for the plaintiff for $65 damages, and costs, $17.88½.

To reverse this judgment, the defendant below brings the cause to this Court on a writ of error, and assigns for error: —

1. That the Court erred in allowing the plaintiff below to prove the contract for the sale of the claim, referred to in the said plaintiffs' declaration, by *parol* testimony, said contract not having been reduced to writing, although the sale was for such an interest in lands as is embraced within the statute of frauds.

J. C. Hall, for plaintiff in error.

E. H. Thomas, for defendant in error.

Defendant contends that the ruling of the Court below was correct. That supposing such a sale to be within the

statute of frauds, it is saved by the law of Wisconsin, approved December 3, 1836, entitled "An Act to provide for the collection of demands growing out of contracts for sales of improvements on public lands." Which same law was re-enacted word for word, in this territory, and approved January 15, 1839. See first volume Iowa Statutes, page 388. Which statutes make all parol contracts and assumpsits in relation to the pablic lands valid in law and equity. This statute was in force when the sale in the above suit was made, and has been in force ever since. This statute was passed by the legislature expressly to validate such parol sales to claims, and save them from the operation of the statute of frauds, and this statute, so far as it conflicts with the statute of frauds, repeals the same.

But again, supposing we had no such statute, defendant contends that such parol sale would be good at common law, and that it does not pass such an interest in lands as is contemplated by the statute of frauds. Our statute of frauds in this respect is an exact copy of the British statute of frauds; 29 Car. I. Cap. 3, and numerous decisions of the English Courts have settled that this statute applies to a sale of land or some interest therein. See 11 East. 362; 2 M. & S. 205, 208; Chitty on Con. 207. See also American Decisions; Bean, Oden & Rector *v.* Valle &c., 2d vol. Mo. Rep. p. 126.

The point has been thus settled in New York, see 5 Johns. Rep. 272; 11 Johns. Rep. 145.

*177 *See also, 2 Stark. Evidence, note 1, to page 348, referring to Danforth *v.* Lowry, 1 Haywood Tenn. Rep. 61, where it is held that "the terms 'lands, tenements, and hereditaments,' in the statute of frauds, in Tennessee, does not comprehend an equitable estate; sales of occupant claims are, therefore, not within the statute."

Defendant contends, then, that such parol sale to improvements in the United States lands is not a sale of any interest in said lands (especially in this case, as will appear

from the transcript), sai l interest, both legal and equitable, being in the United States, but is merely a sale of improvements (which in most cases is merely personal property), or in other words, a sale of the labor of the vendor and the products of said labor to the vendee. See the case of J. & I. Clark *v.* Shultz, 4 Mo. Rep. p. 235, and the reasoning of the Court, where it is held that "an improvement on the land of the United States may be sold without writing and is not affected by the statute of frauds." See also, the authorities referred to in that case.

By the Court, Wilson, Justice.— The only question which arises in this case is presented by the bill of exceptions, which is as follows; viz: —

"Be it known, that on the trial of the above cause, the plaintiff introduced a witness to prove a parol contract for the sale of the claim of the plaintiff to defendant, referred to in his declaration, which contract was never reduced to writing, nor the contract on which plaintiff sought to recover ever reduced to writing. The defendant objected to the introduction of the evidence on the ground that a claim was an interest in land within the meaning of the statute of frauds, which was overruled by the Court, and the testimony permitted to go to the jury, to which defendant excepts, &c."

Is a parol sale of improvements upon the public lands such a sale as is affected by the statute of frauds? The 1st, 2d, and 3d sections of the statute of frauds in force here are taken from the statute of frauds, 29 Car. I. Cap. 3, and it is now well settled by numerous decisions that this statute embraces within its provisions only sales or transfers of lands or some interest therein. 11 East. 362; 2 M. & S. 205, 208; Chitty on Con. 207; Robts. on Stat. of Frauds, 126–7; 4 Mo. Rep. 235.

In Missouri, where the statute of frauds is similar to that of ours, a case precisely in point will be found. See the

case of Clark *et al. v.* Shultz, 4 Mo. Rep. 235, where the Court use the following language:—

*178 * "In New York, under precisely such a statute as our own, it has been settled that an improvement on the public land is not such an interest in or concerning the land as to make it necessary to reduce the sale or contract for the transfer of it to writing. 5 J. R. 272; 11 J. R. 145."

In that case judgment was rendered for the plaintiff on two promissory notes, the consideration of which was a verbal contract for the sale of the right of the plaintiffs to certain improvements upon the public lands. Whether there were statutes in those states, authorizing the collection of demands growing out of contracts for sales of improvements on public lands, does not appear from the decisions referred to. But here, at the time of making the promise sued upon in this case, a law was in force enacting "that all contracts, promises, assumpsits, or undertakings, either written or verbal, which shall be made hereafter in good faith and without fraud, collusion or circumvention, for sale, purchase, or payment of improvements made on the lands owned by the government of the United States, shall be deemed valid in law or equity, and may be sued for and recovered as in other contracts."

As the statute of frauds does not apply to such a contract or promise, and as the statute provides for the collection of these demands, the judgment below is affirmed.

George W. Colcord and Elijah Sprague *v.* John P. Funk.

GEORGE W. COLCORD and ELIJAH SPRAGUE, plaintiffs in error, *v.* JOHN P. FUNK, defendant in error.

Error to Des Moines.

A service on a defendant, on a petition under the mechanics' lien law, by posting a copy of the summons on the property to which the lien attached, is not a good service, unless the defendant cannot be found to receive personal service. And the sheriff should first endorse "not found" (*i*).

D. RORER, for plaintiffs in error.

JAMES W. WOODS, for defendant in eror.

Errors assigned: —

1. Judgment was taken by default, without any legal service of process on defendants, or either of them, or other legal notice.

*2. In the plaintiff's petition, the defendant below *279 is charged in debt, and the judgment is rendered for a sum in damages.

PER CURIAM, MASON, CHIEF JUSTICE.— This was a petition filed under the mechanics' lien law. The return of the sheriff shows that he made a service of the writ, by posting a copy on the property to which the lien attached, without stating that the defendant could not be found in his county. This was defective, and a judgment having been obtained by *default*, we think substantially erroneous. The statute only authorizes this mode of service where the debtor cannot be found in the county. See acts of 1840, page 78. The sheriff might have seen the defendants every day while the writ was in his possession, and still

(*i*) This decision has no application to the mechanic's *lien* law now in force. See Revision, ch. 79.

they may never have known of the pendency of the suit. Where debtors abscond, they must at their peril ascertain whether notices have been posted upon buildings they have recently erected, but not so, where they remain constantly in the county. If the sheriff neglected to serve the writ personally, when he had sufficient opportunity, and they have thereby suffered detriment, what is their remedy? The sheriff is not liable for a false return. Their only adequate remedy seems that to which they have resorted.

The judgment will, consequently, be set aside, and the case sent down for further proceedings thereon in the Court below.

JAMES W. WOODS and EDWARD H. HOBERT, plaintiffs in error, *v.* JONATHAN MORGAN and WILLIAM MORGAN, defendants in error.

Error to Des Moines.

A failure to enter a *similiter* to the defendants plea is not an error for which a reversal can be asked.

A failure to convey, or an offer to convey is no bar to the recovery on a negotiable note, given in consideration for the purchase of the land. The contracts are independent (*j*).

This was an action of assumpsit, brought by Jonathan
*180 and William *Morgan, on a promissory note executed by J. Weston Woods and Edward Hobert, for eighty-five dollars and seventy-five cents, payable six months after date, and dated December 12, 1840.

(*j*) *Contra*, School District No. 2, &c. *v.* Rogers, 8 Iowa, 316; Bannon *v.* Beam, 9 Iowa, 395; Brandt *v.* Foster, 5 Iowa, 287; see also Shaw *v.* Brown, 18 Iowa, 508.

The declaration contains but one count, in the usual form.

The defendants pleaded, that the plaintiffs ought not to recover or maintain their action, because that the plaintiffs, on the 12th day of December, 1840, by their writing obligatory, as the administrators of David James, bound themselves in the sum of five hundred dollars to said Woods and Hobert, their heirs, &c., conditioned, &c., to convey to said Woods and Hobert seventeen acres of land, upon the payment of said note, on or before the 12th June, 1841, but if the note was not paid at maturity, the bond to be of no effect, &c. That the said plaintiffs had not made, or caused to be made, or offered or tendered said deed to said Woods and Hobert, and that the making and tendering said deed was the consideration of said promissory note, concluding with a verification, &c.

The defendants also pleaded the general issue.

To the first plea the plaintiffs demurred, and for special cause assigned: —

1. That the plea was argumentative, that it stated what the defendant supposed was the legal effect and operation of the bond set out in the plea.

2. That said plea was no defence to said action.

The demurrer was sustained, and the defendants excepted to the ruling of the Court.

At the February term, 1842, the cause was submitted to the Court, and a judgment rendered for eighty-nine dollars and sixty cents, in favor of the plaintiffs.

The defendants then moved in arrest of judgment on the grounds that there was no issue joined, which motion was overruled.

The defendants bring the cause to this Court by writ of error and for cause of reversal.

Woods, attorney for plaintiff, assigns: —

1. There was no issue joined by the parties that the Court could try.

2. That the Court below erred in sustaining the demurrer of the plaintiff to the defendant's special plea, inasmuch as it was a full answer to the plaintiff's cause of action.

3. The Court erred in not granting a new trial, there being no issue of fact or law, on which to try the case.

GRIMES & STARR, for defendants in error.

*181 *If the purchaser give a bill of exchange or other security, for the purchase money, payable at a certain day, he must pay it when due, and cannot resist the payment, even in the case of a bill of exchange, on the ground that there was no consideration for the drawing of the bill because the seller has refused to convey the estate according to the agreement. But he will have his remedy upon the agreement for the non-execution of the conveyance. Sugden on Vend. 180. By the terms of the bond set out in the plea, the payment of the note was a condition precedent to the making of the deed, and the deed should have been made and presented by the purchaser. Sugd. Ven. 181–2. The omission to add a common similiter cannot be assigned as error. 1 Blackf. Rep. 29.

PER CURIAM, MASON, CHIEF JUSTICE. — The first error assigned in this case is that there was no issue joined. The Supreme Court in Illinois has decided that, where parties appear and go to trial, without any plea at all being put in, it is such an irregularity as will be cured after verdict by the statute of amendments. Breese's Reports, 14. There appears to be good sense in that decision. But in the present case, the only defect seems to have been an omission of the similiter to a plea of the general issue. This we have often decided to be no substantial error.

But the principal point relied upon, to obtain a reversal, is that the Court sustained the demurrer to the special plea. The plea alleged that the promissory note,

on which the suit was brought, was given for the purchase money of a tract of land, which the defendants in error had bound themselves to convey to the plaintiffs in error by a good warranty deed, upon the payment of said note; and that the said defendants in error had not made or tendered said deed. As a general rule, the vendor of real estate cannot maintain his action for the purchase money without having executed a conveyance, or offered to do so. The case, however, is different where the terms of the contract are such as to show a contrary intention in the parties. In this case, the defendants below had given their promissory note, negotiable under the statute. In the hands of an assignee the action might clearly have been maintained, without any regard to the tender of a deed. The legitimate inference, therefore, is that the defendants below intended the contracts to be *independent*, and such is the established rule of law. See Sugden on Vendors, 180.

The judgment is affirmed.

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*William Gordon and Arthur Washburn, plaintiffs in error *v.* N. E. Janney & Co., defendants in error. *182

Error to Muscatine.

In an action by partners, it is not necessary to prove the names of the individuals composing the firm, if the contract is made in the partnership name (*k*).

Where a suit is brought on a note, payable to a firm, it is advisable to declare in the partnership name, in order that the proof and allegations may correspond.

Proof of the defendant's signature to a note, given to a partnership, is sufficient evidence of the partnership name.

(*k*) The principles of this case are superseded by the Revision. See, *ante*, page 105, note (*m*).

William Gordon and Arthur Washburn *v.* N. E. Janney & Co.

This was an action of assumpsit, on a promissory note, of which the following is a copy: —

"One day after date, for value received, we promise to pay N. E. Janney & Co., or order, without defalcation, sixty-seven dollars and twenty-six cents. Witness our hands and seals, this 27th day of June, 1837; with interest at ten per cent.

"GORDON & WASHBURN."

The declaration is in the usual form.

At the January term, 1839, the plaintiffs moved for a default for the want of a plea, which was ordered.

Afterwards, the defendants moved to set aside the default on affidavit of Gordon, which was granted, and the defendants ordered to plead instanter. The defendants then filed a plea of non assumpsit.

At November term, 1841, the cause was tried before Judge Williams and a jury, and a verdict and judgment for plaintiffs.

On the trial of the cause, the plaintiffs proved that the signatures of "Gordon & Washburn," affixed to the note, was in the hand-writing of the defendant, *Washburn*, which was all the proof the plaintiffs offered of the existence of their own firm. The Court charged the jury that such proof was sufficient to establish the existence of the partnership between the plaintiffs, provided they were satisfied, from the evidence, that the defendants were partners. To which opinion the defendants excepted.

Lowe & Whicher assign for error: —

1. The Court erred in charging the jury, as set forth in the bill exceptions.

*183 *2. The Court erred in charging the jury that if they were satisfied from the evidence that the defendants were partners, that then by merely proving the

signatures affixed to the note sued upon were in the handwriting of one of them, it would be sufficient to establish the existence of the partnership between the plaintiffs.

3. The Court erred in giving judgment for the plaintiffs instead of the defendants, &c.

By the Court, Mason, Chief Justice. — The first point to be considered in this case is whether, when the plaintiffs set out the names of the individuals composing their firm, instead of declaring in their partnership name, it is necessary for them to prove that those identical individuals do actually compose the firm. Our statute provides, in effect, that where a suit is brought upon a promissory note, &c., made payable to partners trading together under their partnership name and style, it shall only be necesary to prove the partnership name and style, without proving the names of the individuals who compose the same. That statute seems to cover this case. It would probably be better only to set forth in the declaration the partnership name and style in such cases, in order that the proof and allegations might correspond; still, in either case, the statute seems imperative in rendering the proof of the individuals composing the firm unnecessary.

Another question presented for decision is whether the proof of the defendant's signature to a note given to a partnership is sufficient evidence of the partnership name and style. We think it is clearly so.

To give a promissory note to N. E. Janney & Co. is a written admission of the existence of such a company, and that such is their partnership name and style.

The proceedings below being in strict accordance with these views, the judgment will be affirmed.

*184 *WILLIAM H. LYON, plaintiff in error, *v.* JEREMIAH SMITH, defendant in error.

Error to Henry.

A person who occasionally entertains travelers for pay is not an innkeeper within the meaning of the law, and if property is intrusted to his care, by his guests, and it be lost, he is not responsible as a common innkeeper (*l*).

This was suit was originally instituted before a justice of the peace by Lyon against Smith, and removed to the District Court of Henry by *certiorari*. At the September term, 1842, the parties submitted the law and the facts to the Court, Judge Mason presiding.

The plaintiff sought to recover the value of property lost at defendant's house, which he, the plaintiff, contended was a public inn. The evidence was that the plaintiff's son went to the house of the defendant in October, 1840, during the sales of public lands at Burlington, with two horses, saddles, and bridles; had his horses put up, and tarried all night as a guest, and that in the morning two bridles, valued at six dollars, and one saddle, valued at fifteen dollars, were lost, and could not be found. Five witnesses were examined, all of whom had put up with defendant, and paid such bills as are usually paid at taverns in the country; but all the witnesses, with the exception of Henry M. Snyder, had only staid with the defendant at the time of the different land sales in Burlington. Mr. Snyder had, at different other times, stopped with defendant and was always charged, and also paid the usual bill charged by country taverns. Upon this statement of facts, the Court decided that the defendant was not an inn-

(*l*) On the relation of innkeeper and guest; see Hays *v.* Turner, 23 Iowa, 214.

keeper within the meaning of the law, and gave judgment against the plaintiff for costs.

The defendant below, on a writ of error from this Court, seeks to reverse the judgment: —

1. Because that the defendant was not an innkeeper within the meaning of the law.

2. Because the Court, upon the facts set out and contained in the record, gave judgment for the defendant.

GRIMES & STARR, for plaintiff in error.

Was the defendant an innkeeper within the contemplation of the *law? In Thompson *v.* Lacy, Barn. *185 Ald. 283, the Court of King's Bench gave the following definition of an inn: —

"I take the true definition of an Inn to be a house where the traveler is furnished with everything which he has occasion for, whilst upon his way." And in the same case the Court held that the rule extended to cases where the guest was not a traveler. It is not necessary that the keeper should have a license or a sign. Bacon's Ab. Tit. "Innkeeper."

If the defendant was an innkeeper, he became liable for the articles deposited with him by plaintiff. York *v.* Grindstone, 2 Ld. Raymond, 866; Chute *v.* Wiggins, 14 Johns. R. 175; 2 Wend. R. 282.

He is chargeable on the ground of the profit which he receives for entertaining his guests, and this is the true criterion by which to determine the character of his house. 2 Kent's Com. 592.

M. RENO, for defendant in error: —

An inn may be defined to be a house kept open *publicly* for the entertainment of travelers and others paying a reasonable compensation for the accommodation which is professed to be given. Jones on Bailments, p. 74, note 50.

An innkeeper is one who makes it his business to entertain travelers, &c., Bacon's Ab. "Inns and Innkeepers," B. A person who keeps a mere private boarding house, is in no just sense an innkeeper. Story on Bailments, 311. It must be a common inn and kept for travelers generally, and not for a short season of the year. Story on Bailments, 310; Chitty on Con. 147; Kent's Commentaries, 594.

It is not sufficient to fasten the liability of an Innkeeper on an individual, that he occasionally permits persons to tarry with him over night for a compensation. It will not be contended that such a person would be liable for damages in refusing to admit travelers; if not, he is not in any just sense an innkeeper within the meaning of the Common Law.

Per Curiam, Mason, Chief Justice. — Had the defendant not taken all the care of the property of the plaintiff, entrusted to his charge, which a prudent man would of his own, he would have been clearly liable, by virtue of the principles of law applicable to that species of bailment. But it is sought to bring him within the class of innkeepers, and thus render him responsible as an insurer of all the property of his guests, which may have been left in his keeping.

*186 *The Court below decided that the facts proved did not bring him within that class, and in that decision we think it was clearly correct. To render a person liable as a common innkeeper, it is not sufficient to show that he occasionally entertains travelers. Most of the farmers in a new country do this, without supposing themselves answerable for the horses or other property of their guests, which may be stolen or otherwise lost, without any fault of their own. Nor is such the rule in older countries, where it would operate with far less injustice, and be less opposed to good policy than with us. To be subjected to the same responsibilities attaching to innkepers, a person must make

tavern-keeping, to some extent, a regular business, a means of livlihood. He should hold himself out to the world as an *innkeeper*. It is not necessary that he should have a sign, or a license, provided that he has in any other manner authorized the general understanding that his was a public house, where strangers had a right to require accommodation. The person who occasionally entertains others for a reasonable compensation is no more subject to the extraordinary responsibility of an innkeeper than is he liable as a common carrier, who in certain special cases carries the property of others from one place to another for hire.

The only proof tending to charge the defendant in the present case is that he had entertained several individuals at his house over night and been paid a compensation for his care and attentions; but there was no proof that he held himself out in any manner as a common innkeeper, or that he was so regarded by the public.

The judgment below will, therefore be affirmed.

HENRY B. HENDERSHOTT, plaintiff in error, *v.* HUGH R. THOMPSON, defendant in error.

Error to Des Moines.

The omission of the initial of the second Christian name of the assignor, in a writ, is immaterial.

Assignment of errors:—

The Court erred in admitting the note to be read in evidence, inasmuch *as there is a variance between *187 said note and the original summons, and the record of the justice, the error being the admission of a different note from the one declared upon.

Jonathan J. King *v.* Charles B. Wall.

Woods, for plaintiff in error.

Grimes, for defendant in error.

The only error assigned, is a variance between the description of the plaintiff and the payee of the note.

The variance is none in fact, the middle letter or name, is no name, and the variance should have been suggested in the magistrate's Court.

Per Curiam, Mason, Chief Justice. — The only error assigned in this case is, that the summons issued by the justice, described Thompson as the assignee of William C. Harris, whereas, that offered in evidence, was executed to Wm. Harris, and by him assigned to Thompson. This variance is clearly immaterial, especially under the circumstances of this case. Judgment affirmed.

Jonathan J. King, plaintiff in error, *v.* Charles B. Wall, defendant in error.

Error to Henry.

A promissory note, although not payable to order or bearer, may be given in evidence under the common count, for money had and received by the endorsee (*m*).

This was an action of assumpsit in the District Court of Henry county, brought by Charles B. Wall, assignee of Abraham C. Dover, against Jonathan J. King, on a note, of which the following is a copy: —

"On or before the first day of February, 1841, I promise to pay Abraham C. Dover two hundred dollars, for value received. J. J. KING.

"April 25, 1839."

(*m*) This can not now be done under the Revision which abolishes the common counts. Rev. § 2872; Johnson *v.* Collins, 14 Iowa, 68.

"Endorsed:

*"New London, February 6, 1841, Mr. Jonathan J. *188
King, please pay Charles R. Wall the within note of two hundred dollars.

"A. C. DOVER."

The declaration is in the usual form, setting out the note, endorsement, &c., and concluding with a count for money had and received.

Plea, non assumpsit.

At March term, 1842, the plaintiff entered a discontinuance as to the first count, and offered the note in evidence on the trial, under the count for money had and received, which was allowed by the court, and a verdict had for the plaintiff for $135.38.

The defendant moved to set aside the verdict of the jury, and that a non-suit be entered, because the Court erred in admitting the note in evidence, under the count for money had and received. Which motion was overruled, and judgment rendered on the verdict.

The defendant brings the cause here upon a writ of error, allowed for probable cause.

HALL, for plaintiff in error, assigns:—

1. The Court below erred in admitting the note in evidence under the count for money had and received.

2. In not setting aside the verdict and entering a non-suit.

3. Other errors.

Authorities cited, Chittty on Bills, 8 ed. 594. A promissory note is only evidence on the money counts between the original parties to it, unless it could be proved that the defendant had received value to the use of the plaintiff, &c.

GRIMES & STARR for defendant.

This point was decided by the Supreme Court of Massachusetts in the case of Ellsworth *v.* Brewer, 11 Pick. R. 316, where the Court says:—

"To maintain assumpsit, there must be a privity between the parties, but it may be a privity in fact or in law; as between each party to a bill of exchange or promissory note, and every other party, where there is a sufficient privity in law. And as such negotiable contract is presumed to be a cash transaction, and as a money consideration is presumed to pass at the making, and at each endorsement of the instrument, each party liable to pay is held responsible as for so much money had and received, to the use of the party, who is for the time being entitled to recover."

See State Bank *v.* Hurd, 12 Mass. R., 173; 12 Johns. *189 R. 90; 5 *Wend., 490; 8 Peck., 48; 4 term, 339; 8 N. H. R., 334; 15 Mass. R., 331; 4 Pick., 421; Bayley on Bills, 391.

PER CURIAM, MASON, CHIEF JUSTICE.—The only question presented by this case is, whether the note was properly admitted in evidence under the count for money had and received. It would seem from the authorities cited by the plaintiff in error, that the English Courts would have rejected this evidence. The Courts in this country, however, seem to have deviated from the English decisions, so far as to allow notes made payable to order or bearer, to be given in evidence, under the count for money had and received, in a suit by the endorsee, or the bearer against the maker. This appears to have been done on the ground that there is a privity in law between the two parties; that the maker is presumed to have received money from the payee at the time of executing the note, which is, therefore, evidence of money had and received for the use of the latter, and that the law substitutes the indorsee or bearer, in place of the payee, and invests him with all his rights and privileges. We do not feel disposed to be less liberal in the adoption of a rule of evidence than the Courts of New York and Massachusetts appear to have been.

But it is said that no authority can be produced, where such evidence has been admitted, where the note is not negotiable on its face, and the suit is brought by the indorsee. Doubtless this proposition is true. We, however, have a peculiar statute in relation to promissory notes, which renders all notes negotiable in the same manner as inland bills of exchange. It further provides that "any to whom such sum of money or other personal property is by such indorsement made payable, in case of the death of such assignee, his executor or administrator, may, in his name, institute and maintain the same kind of action for the money thereof, against the person who made and executed such note, as might have been maintained against him by the payee, in case the same had not been assigned." This statute, we think, destroys all distinctions between notes negotiable and notes not negotiable on their face, and that, therefore, a note of the latter description may be given in evidence under the count for money had and received in a suit by the indorsee against the maker.

That the note was not signed by the full name of the defendant, or indorsed by the payee by his full name, can make no difference, the bill of exceptions states that the execution and indorsement of the note was *admitted*. The effect of which admission must be understood to be that the note was signed by the defendant and indorsed by the payee. It is *contended that the law cannot *190 change the parties to a contract so as to effect their rights, without their consent. This is certainly true to a certain extent; but if it be understood to assert that the law cannot change a rule of evidence so as to affect a contract without the consent of the parties thereto, the position is not tenable. In the present case, the substantial rights of the defendant are not affected. He is not made liable by the statute to pay money from which he would otherwise have been exempt. Independent of the statute, he would have been liable to pay the full face of the note. The law

merely authorizes the assignee to sue in his own name, and indirectly establishes a new rule of evidence, in the case; to-wit: that the note may be given in evidence under the common counts.

Moreover, the note in this case was given after the law just referred to took effect. That law entered into and formed a part of the contract. The note, therefore, at the moment it was signed, was the same as though it had been written payable to order. If, therefore, the legislature would have no power to render a law of this kind applicable to an antecedent contract, that objection would not be available in the present case. The judgment below will, therefore, be affirmed.

THE UNITED STATES, plaintiff in error, *v.* MORDACAI CROPPER, defendant in error.

Error to Johnson.

The boards of commissioners must deliver to the clerks of the District Courts attested copies of the lists of grand jurors, thirty days previous to the term, otherwise the grand juries will not be legally chosen (*n*).

LOWE, for plaintiff in error.

WOODWARD, for defendant in error.

PER CURIAM, WILSON, JUSTICE.— This was an indictment for larceny, found at the May term, 1841, of the District Court for Johnson county, against the defendant.

*191 *To the indictment the defendant pleaded that the persons by whom the indictment was found, as a grand

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(*n*) Superseded by subsequent legislation.

jury, were not a legal grand jury, for the reasons that the county commissioners of said county did not, within three days after the selection of said persons as a grand jury, deliver to the clerk of the said District Court an attested copy of the names of the persons selected as such grand jury.

To this plea the district prosecutor replied that S. B. Gardner, the clerk of the District Court of said county, is now, and was, at the time of the selection of the grand jury, the clerk of the board of county commissioners of said county, and as such, made a record of the list of said grand jurors upon the books of said commissioners, as they were originally drawn and selected, which books were left in the possession of the clerk of the District court at his office, within three days after the selection of said persons, as a grand jury, &c.

To this replication the defendant demurred which demurrer was sustained.

The errors assigned, are:—

1. The sustaining the demurrer to the replication, put in to the plea in abatement.

2. That the Court did not look back to the first error or defect in the proceedings, which may be found in the plea in abatement, which does not, in legal contemplation, present matter sufficient to abate the indictment.

There are two separate laws, passed on the same day, prescribing the manner of selecting grand jurors. Both provide that the county commissioners of each county shall select twenty-three persons to serve as grand jurors, thirty days previous to the sitting of the District Court. They differ but in two particulars; to-wit: one requires the county commissioners to make out and deliver to the clerk of the District Court the list of grand jurors thirty days previous to the term; the other requires the commissioners to make out the list thirty days previous to the term, and to deliver an *attested copy* within three days thereafter to the clerk of the District Court.

Although the first statute referred to does not require the list to be attested, yet the other making such requirement, being of the same date, must have effect.

The copy of the names of the grand jurors, delivered by the county commissioners to the clerk of the District Court, should be attested, that is to say, it should bear the usual test of the board of commissioners; to-wit: their seal.

*192 *The only question which remains is, whether the allegations in the plea; to-wit; that S. B. Gardner, the clerk of the District Court of Johnson county, was, at the time of selecting the grand jury, also the clerk of the board of commissioners, and, as such last mentioned clerk, made a record of the list of grand jurors aforesaid upon the books of the board of commissioners aforesaid, as they were originally drawn and selected, which books were left in the possession of the clerk of the District Court, within three days after the selection of such persons as a grand jury, would, if true, be a sufficient compliance with the statute. We think not. The statute is positive in its terms, and a defendant in an indictment for a criminal offence has a right to a strict compliance with the statute, and a strict construction of the law. The statute required an attested copy of the list of grand jurors to be made out and delivered to the clerk of the District Court, which was not done, and as the defendant made the objection at the proper time, and in the proper manuer, we think the Court below was correct in sustaining the objection.

Judgment affirmed.

Mason, Chief Justice, Dissenting.—We have two statutes prescribing the manner of selecting grand jurors, both bearing the same date. See laws of 1838–9, pages 112 and 278. The first requires the county commissioners to make out and deliver to the clerk of the District Court a *list* of twenty-three persons selected as grand jurors. The other directs that an *attested copy* of the names selected should be delivered in like manner. The former of these statutes

seems to have been literally complied with, the latter not. Was the indictment thereby invalidated?

Where two statutes are simultaneously enacted, referring to the same subject, covering the same ground, and both merely directory, it seems by means, perfectly clear to me, that a compliance with either is not all that is requisite. But the present case is stronger than the proposition just laid down. It is the general act regulating criminal proceedings, which only requires a "*list*" of the grand jury to be furnished to the clerk of the District Court. This appears to have been strictly complied with. The act then proceeds to provide for all the other steps to be taken, up to the final conviction and sentence. Where these steps have been accurately pursued, will the punishment be illegal because in another statute, passed at the same time, and only of equal authority, a similar mode of proceeding, but differing slightly in detail, has been pointed out? The proceedings authorized by the statute have the foundation which the same statute requires. The basis is sufficient for the superstructure.

*But my opinion does not rest upon that position. *193 Admitting the statute which directs an "*attested copy*" to be filed to be of paramount authority, does it follow that every deviation from the mode therein pointed out will vitiate the indictment? To fail to comply strictly with the statute is one thing; to deviate so far as to render all the proceedings invalid is another and a very different matter.

For example: The judge is required to give certain statutes in charge to every grand jury. If he should neglect to do so, could that fact be successfully pleaded in abatement to all the indictments found by that jury? I believe it to be a sound rule that a deviation from a directory statute cannot be taken advantage of by a defendant, without there is a probability that he may have been there-

by substantially prejudiced. On this point, also, see laws of 1839, page 120, § 93. Thus, the justices' act provides that a summons should issue at least seven, and be served five days before the return day, thereby giving the constable two days in which to make the service, and the defendant five days thereafter to prepare for his appearance and defence. Suppose the summons to be issued only six days, but served full five days before the return day, can the defendant successfully object to the process on account of sufficient time not having been given to the constable in which to make service? The officer would, in such case, be guilty of no neglect of duty if he should fail to serve the process in due time, but the defendant would have no right to complain. Where a provision of this kind is made exclusively for the benefit of an officer of the Court, it seems to me that he is the only one to object to a non-compliance therewith.

In the case at bar, the county commissioners were required to furnish the clerk of the District Court with an "*attested copy*" of the names of the grand jurors by them selected. What was the object of this requirement? Evidently, to give that clerk authentic information of the names he was to insert in the *venire*. Without such an "*attested copy*" he would not be obliged to issue a *venire* at all. If, however, he should do so upon other satisfactory information, inserting therein the precise names of the individuals selected by the county commissioners, would they not, when duly empanneled and sworn, be a competent grand jury? Would any indictment they should present be invalid because the clerk of the board of commissioners had failed to attach his seal to the list filed with the clerk of the District Court? Especially when, as in the present case, these two clerkships were held by the same individual, and the only defect was that he had failed to make out this list as clerk of the commissioners,

and certify it under seal to himself as clerk of the *District Court. Can any possible prejudice result *194 to the defendant in consequence of such omission?

It is true the law entertains objections in criminal proceedings, which would not be tolerated in civil cases, but this rule, it seems to me, should be limited to matters essential to a fair defence on the merits. I see no reason why the penal law should create needless opportunities for guilt to escape detection and punishment — why a defect of mere form, affording no test of guilt or innocence, should be any more available to a defendant in a criminal than in a civil case.

In fact, reasoning from principle, I should suppose a contrary rule would be far more defensible. A strict enforcement of the criminal code is of far more importance to the well being of society than that of the civil. To give guilt an unnecessary means of escape is much more reprehensible and pernicious than to introduce defects in the laws for the enforcement of contracts. Every opportunity to escape on mere technical grounds is needlessly paralyzing *pro tanto* the arm of the law; voluntarily diminishing the certainty with which punishment follows transgression, and thus, negatively at least, inviting the commission of offences. I would say, then, give the accused every reasonable opportunity to enable him to vindicate his innocence; be liberally indulgent to his objections, to whatever might have a tendency to convict him unjustly; but never, unless from necessity, open an aperture through which guilt and innocence may alike escape with impunity.

I know a somewhat different rule was early adopted in the English Courts, and has been followed with rather a blind acquiesence in most of the states of the Union. That rule originated when the laws of England were written in blood, and was the result of the humanity of her judiciary, struggling to weaken or evade the sanguinary edicts of

tyrants. The judges had no power to annul or even to mitigate the law which affixed death as the penalty for many of the minor offences, but they could and did give the accused the benefit of delay, and even of ultimate escape, by sustaining objections to indictments for formal and trivial defects. If they could not modify the severity of punishments too severe, humanity prompted them to diminish their certainty.

With us the case is very different. Following the dictates of humanity and true policy, we have gone far to revolutionize the penal code of our ancestors. Our legislators recognize the maxim that certainty of punishment is better than severity. Under these circumstances, it seems to me the Courts should do all they justly can to render punishment the inevitable consequence of transgres-
*195 sion. Instead of blindly *adopting rules dictated by humanity, under circumstances so totally different, we should apply the principles of reason to our own laws and present situation. See the case of the United States *v.* Dollarhide, decided at this term of the Court. I, therefore, respectfully dissent from the opinion of the Court in the present case.

WILLIAM GORDON and JAMES TANNAHILL, plaintiffs in error, *v.* JOHN C. ATKINSON, defendant.

Error to Muscatine.

In an action on a delivery bond it is not necessary to assign breaches in the declaration (*o*).

(*o*) In all actions on bonds with conditions, the conditions must be noticed and the breaches relied on alleged in the petition. Rev. § 2980.

William Gordon and James Tannahill *v.* John C. Atkinson.

This cause was tried at the July term, 1841, of the Muscatine District Court, before the Hon. Joseph Williams. It was an action of debt on a delivery bond. Judgment by default and inquiry.

Stephen Whicher, for plaintiff in error.

It appears by the pleadings that the plaintiff below did not assign in his declaration, nor in the record, any breach in the condition of the bond. This is the principal error relied upon to reverse the judgment of the Court below. The statute of 1839, p. 200–1, provides for the taking of delivery bonds for property taken under execution, and that an action may be had thereon whenever the conditions thereof may have been violated. The statute also provides, p. 3 and 4, § 16, that in actions brought on penal bonds, conditioned for the performance of covenants, the plaintiff may assign in his declaration as many breaches as he may think fit. This statute is substantially a copy of 8 and 9 W. 3, c. 11, § 8, and must receive the same construction. *May assign* is compulsory upon the plaintiffs. 1 Saund. R. 58. The same doctrine is recognized in Chitty on Plead. Nor is this bond an exception to the general rule as mentioned in Saunders. The statute contemplates an assignment of the breach. A violation of the condition must be pleaded as well as proved.

Grimes & Starr, for defendant.

*It is contended that the plaintiff below was obliged *196 to proceed on the bond under the provisions of the sixteenth section of the Practice Act. Without being at the trouble of examining the general nature and bearing of that act, we will admit, for the sake of argument, as contended by the plaintiffs in error, that the Practice Act is the same with the act of W. 3, c. 11, § 8; yet, by reference to the 2d vol. of Chitty, 440, we find that the Eng-

lish adjudications have settled that that act had no reference to bonds conditioned for the payment of a sum certain, nor to bail bonds; nor to cases where the damages assessed by the jury meet and satisfy the entire condition of the bond. Here the damages are assessed to satisfy the entire condition of the bond. The statute expressly provides for this. See the 11th sec. of the law in reference to executions. Iowa Laws, approved January 25, 1839. In reference to the construction of the Practice Act, sec. 16, see 2 Chitty, 440; also, 2 Barn. & Cress. 82, 89, &c.

There can be no dispute that, in actions upon bail bonds, replevin bonds, &c., the plaintiff may declare upon an unconditional bond, and that the condition is only matter of defence. See 1 Chitty, 615, 618.

Per Curiam, Mason, Chief Justice.— This was an action of debt brought upon a bond for the delivery of property taken on execution. No breaches were assigned on the record, for which omission the plaintiffs in error ask a reversal of the judgment obtained below.

The sixteenth section of our Practice Act seems to render it necessary to assign breaches in all cases coming within the statute. Such is the decision in England under a like statute. 1 Chitty, 408. There, however, these breaches need not be assigned in the declaration, but may be set forth in the replication. But suppose there is no plea, and consequently no replication. The English statute provides for suggesting the breaches upon the roll on which enquiry is to operate, without requiring them to be set forth in the declaration. Our statute makes no such provision, but requires that the breaches be assigned *in the declaration* in cases coming within the statute.

Is this, then, a bond within the statute? We think not. That statute provides that "in actions brought on penal bonds, conditioned for the performance of covenants, the plaintiff may assign in his declaration as many breaches as

he may think fit; and the jury, whether on the trial of the issues or of enquiry, shall assess the damages for so many breaches as the plaintiff shall prove, and the judgment for the penalty shall stand as a security for such other breaches as may afterwards *happen." The statute *197 seems to look to cases where the breaches upon which the damages are to be assessed are only a portion of those against which the bond was to operate as a security, and not to those where the damages to be assessed in the case are to satisfy the entire condition of the bond. It has been so held in England, under their statute. 2 Chitty, 440.

The case now under consideration is of this latter description. There is only one breach, and all the damages are to be assessed at once. In cases like this, the statute declares that where the property is not forthcoming, agreeably to the condition of the bond, suit may be brought thereon, and on the recovery being had, the amount due on the execution shall be assessed in favor of the plaintiff, if the property be worth so much, &c. Act of 1838–9, p. 200. This bond is clearly not within the statute requiring the assignment of breaches. Besides, such an assignment is wholly unnecessary. The law has pointed out the measure of damages against which nothing can protect the defendant, but the performance of the condition of the bond. If he had done this he should have so pleaded. His default is an admission against himself. The omission of the assignment of breaches in cases like this would, therefore, at most, be only a formal defect for which judgments are not to be reversed.

Judgment affirmed.

Asbury B. Porter, plaintiff in error *v.* Thomas W. Lane, defendant in error.

Error to Henry.

The addition of the similiter is mere matter of form, and is not ground of error, after trial by consent, especially.

If demurrers are undisposed of when parties go to trial upon issues of fact, they will be considered as waived by the demurrer, and the Supreme Court will not disturb the judgment below in consequence of such irregularity (*p*).

This was an action of debt brought by Lane against Porter, in the District Court of Henry county, upon
*198 a promissory note for one hundred dollars, *given by Porter to Lane, November 24, 1838, payable one day after date.

The cause was tried at the September term, 1841, before Judge Mason, and judgment for plaintiff.

Porter, plaintiff in error, by Hall, his attorney, assigns :—

1. There were no issues made up upon which this case can be decided.

2. There is no assessment of damages, either by the Court, clerk, or jury.

G. W. Teas, for defendant in error.

Per Curiam, Mason, Chief Justice.—The first error assigned by the plaintiff in error is, that there were no issues made upon which the case was decided. The defendant below, who is the plaintiff here, had filed two special pleas. To these there were special demurrers, and also general replications, broadly traversing the allegations of those pleas, and concluding to the country. The addition

(*p*) See Rev. §§ 2876, 2877, 2878.

of the similiter was a mere matter of form, the omission of which does not render the proceedings substantially defective, especially after going to trial by consent.

The fact that the demurrers of the defendant in error were undisposed of, cannot be successfully objected to here. By consenting to go to trial on issues of fact, the party filing the demurrers must be understood as having waived them, for they should have been disposed of before the issues of fact were taken up, if they were to have been considered at all. At all events no objection can be taken by the plaintiff in error, on account of the demurrers to his plea never having been taken up and decided upon.

The other error assigned is that there is no assessment of damages, either by the Court, clerk, or jury. The record shows that the case was submitted to the Court, and judgment rendered for the plaintiff for the sum of one hundred dollars debt, and six dollars and seventy-five cents damages. Now if this submission was in relation to the issue of fact, there has clearly been no error so far as appears from the record. The case was submitted and judgment rendered for the plaintiff below. It is contended there was no assessment of damages by the Court; but how does that fact appear? The record states no such thing. The Court must have arrived at the amount of the verdict in some manner or other. *After finding for the plaint- *199
iff, the amount was the subject of computation. There is no allegation that any error was made in that computation. It is immaterial, therefore, in what manner the result was reached. We see no error in the case. The judgment below will be affirmed.

James Madison Lewis *v.* The United States.

JAMES MADISON LEWIS, plaintiff in error *v.* The UNITED STATES, defendant in error.

Error to Henry.

A license to keep a grocery is not assignable.

At the March term of the District Court of Henry county, 1842, James Madison Lewis was indicted for unlawfully selling and retailing spirituous liquors in less quantities than one gallon, without then and there having a grocery license.

The defendant pleaded not guilty, and on the trial proved by William G. Waitman, that on the 1st January, 1842, he sold his grocery to the defendant, and, that part of the agreement was, that he, the said Waitman, was to procure a license to commence on the 10th of December, for three months, and the groceries were to be sold under said license and agreement, and that he did, on the 4th of January, procure said license and gave it to said defendant. Upon the introduction of this evidence, with the license to Waitman, the defendant asked the Court to instruct the jury that any selling of liquor by defendant under this license would not make him liable, which instructions the Court refused, and instructed the jury that the license was no shield to his selling. To which opinion the defendant excepted.

The defendant was convicted and fined fifty dollars and costs.

J. C. HALL, for plaintiff in error.

H. T. REID, for defendant.

PER CURIAM, MASON, CHIEF JUSTICE.—The main question presented by this case is whether a grocery license is

assignable. It is justly contended that if the license law is merely a revenue measure, *there is no good *200 reason why the assignee of a grocery should not have the benefit of a license obtained by the assignor. But revenue is not the sole object of the license law, for if so, then every one would have been permitted to set up a grocery upon paying the amount fixed by law. This is, however, only one of the requisites preparatory to obtaining the license. He must, in addition thereto, give bond to keep an orderly house, &c. Now, if the person obtaining such a license may assign the same, he certainly cannot assign the bond so as to render the securities therein liable, without their consent, for the misconduct of the assignee. The requirement of the statute in relation to the bond and securities would be entirely evaded if such assignment were permissible.

It is contended that Lewis was a mere agent or servant of Waitman in this case. We see no evidence in the record sufficient to justify such a conclusion. The contents of the grocery were absolutely sold by Waitman to Lewis, and the other provisions of the contract related merely to the mode of payment. Lewis was to have the sole control of the property, subject only to the condition that if he removed them from Trenton the price he was to pay for them was to be due immediately. The plaintiff in error seems to have had no illegal intention, but he has been misled into a transaction which has rendered him liable to the penalty of the law. We have no power to pardon the offence, however fully we may be convinced that it was not committed willfully.

Judgment affirmed.

JOEL C. WALKER and HENRY ENO, plaintiffs in error *v.* SAMUEL B. AYRES, administrator of Henry D. Davis, deceased, defendant in error.

Error to Lee.

Error will not lie for a misdescription of a note in the declaration, where the plaintiff has appended a true copy (*q*).

This was an action of debt, on four promissory notes, for one hundred and ninty-eight dollars and seventy-five
*201 cents each, *executed by Joel C. Walker, Henry Eno, and Pleasant M. Armstrong, to Samuel B. Ayres, administrator of Henry D. Davis, deceased, payable at different dates. Judgment by default was rendered against the plaintiffs in error at April term, 1841, of the Lee District Court, for the sum of seven hundred and ninety-five dollars debt, and one hundred and sixty-six dollars and six cents damages.

O. S. X. PECK, attorney for plaintiffs in error, assigns:—

1. The plaintiff in the Court below declared on four several supposed writings obligatory, each one of which purporting to be due at a time different from either of the others. And by the first count in his declaration it is alleged that the said plaintiffs in error (with one Pleasant M. Armstrong, who also was declared against), by the first writing obligatory described, agreed and bound themselves to pay to the said defendant in error, or bearer, the sum of one hundred and ninety-eight dollars and seventy-five cents, eighteen months after the date thereof, with interest at the rate of ten per cent per annum, for value received. And in the second count in the said declaration of the said

(*q*) Not applicable to our present system of pleading and practice.

defendant in error, it is alleged that by the said second supposed writing obligatory, described in said second count, the said plaintiffs in error (and said Pleasant M. Armstrong) agreed and bound themselves to pay the said defendant in error, or bearer, the sum of $198.75, with interest at ten per cent per annum, one year after the date thereof, for value received.

And in the third count in the said declaration of the said defendant in error, it is alleged that by the third supposed writing obligatory, described in said third count, that the said plaintiffs in error (and said Armstrong) agreed and bound themselves to pay the said defendant in error, or bearer, the sum of $198.75, with interest at ten per cent per annum, on the first day of September next ensuing the date thereof, for value received.

And in the fourth count in the said declaration of the said defendant in error, it is alleged that the said plaintiffs in error, by the fourth supposed writing obligatory (with said Armstrong), agreed and bound themselves to pay the said defendant in error, or bearer, the sum of one hundred and ninety-eight dollars and seventy-five cents, with interest at the rate of ten per cent per annum, for value received.

And all of said supposed writings obligatory, it is also alleged in said declaration of said defendant in error, were made on the first day of March, A. D. 1839, in the county of Lee aforesaid, and signed by said plaintiffs in error, and said Armstrong, and sealed with their seals, and then and there to the Court shown.

*And the said plaintiffs in error do aver that although *202 the said defendant in error may have correctly described the three supposed writings obligatory mentioned in the first three counts of his said declaration, there is a fatal variance and manifest error in this, to-wit: that in his fourth count in his declaration he has declared on a supposed writing obligatory which, according to the de-

scription therein given, was due on the day of the making thereof, when in truth and in fact the said supposed writing obligatory, given in evidence under said fourth count, was due two years after the date thereof, as will more fully and at large appear, by reference being had to the copies filed by the said defendant in error in his suit in said District Court.

2. For that there was no such writing obligatory as that described in the fourth count of the declaration of the said defendant in error given in evidence in the Court below, and the judgment of the Court below is for an amount greater than was due on such writings obligatory, as were correctly described.

3. For that the sum for which judgment was rendered by the District Court for Lee county aforesaid is larger than the amount of the said three supposed writings obligatory mentioned and described in the first three counts of the said declaration of the said defendant in error, with the stipulated interest thereon, by a large amount, to-wit. $240.26.

Authorities cited in support of errors assigned, 1 Chitty Pl. 334–2; 2 Johns. Cases, 55; 1 Johns. Rep. 105; 1 Chitty, 338; 4 Campb. 176; 8 Johns. R. 253, 256; 3 Cranch. 193; 1 Cond. 493, &c.

Reeves, for defendant, in reply.

It is not denied that a party must state in substance the legal effect of an instrument relied on; and if the contract is misdescribed, the admission of it as evidence may be objected on the ground of variance. But is the contract misdescribed? The count alleges that the defendant, on a certain day, and at a certain place, made his certain writing, &c., and agreed to pay a certain sum with interest from date, at the rate of ten per cent per annum. Now, is not this the legal effect of the writing given in evidence?

At the time of filing the declaration the note was due; stating the time the money was payable could have made no difference in the judgment of the Court. The judgment agrees perfectly with the legal effect of the instrument, and also with the count in the declaration.

As instances where a variance has been held immaterial, see 6 Taunt. 108; 13 East. 410; 5 Taunt. 228; 1 Chitty Rep. 39; 2 Starkie, 29.

*Per Curiam, Mason, Chief Justice.—The plain- *203
tiffs in error were sued below on four promissory notes, described in separate counts. The error assigned consists in the fact that there is a misdescription of one of those notes. Correct copies of the notes were, however, given, each referring to its appropriate count.

The variance alluded to seems to be material, and the only question to be considered is, whether that defect can be reached in this manner. A special demurrer to the declaration for this variance would have been sustained. But where a plaintiff, in pursuance of the statute, has appended a correct copy of the note to his declaration, ought the defendant to be permitted to suffer a default or go to trial, and afterwards reverse the whole proceedings by a writ of error for a defect by which he could not have been substantially prejudiced? We think not. Whether the copy of the note thus given is to be regarded as a part of the declaration, we need not now decide. At least the defendant is fully apprised of the exact nature of the instrument on which he is sued. Judgment here will be a sufficient bar to another suit on the same note, for the note given in evidence in this case must have been substantially the same as that set forth in the copy — not that which is described in the declaration. Where there is a variance, therefore, between the description and the copy, the defendant has no difficulty in determining which he is to defend against; nor is there any difficulty aftewards in ascertaining the instrument upon which the judgment must have

been rendered. We think it, therefore, inconsistent with the prompt administration of justice, as well as with the general principles of pleading, to permit the defendant to raise a successful objection at this stage of the proceedings. Had he desired the copy of the note and the description in the declaration to correspond precisely, he should have demurred at the proper time.

The judgment below will, therefore, be affirmed.

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*204 *CHARLES MADERA, and others, plaintiffs in error, *v.* GEORGE W. JONES, for the use of Charles Sample, defendant in error.

Error to Des Moines.

The law in force at the time a note is made must determine its character; and so far as regards the substantive features of a contract, a note once under seal is always under seal.

Any device which intimates the intention of a party to append a seal to a note, is sufficient to render the note a sealed instrument.

A correct copy of the note appended to the declaration cures any misrecital of it in the body (*r*).

This was an action of debt, brought by George W. Jones, for the use of Charles Sample, against Charles Madera, William Guffy, and Solomon Sherfey, in the District Court of Des Moines county, on a note, of which the following is a copy: —

"$400.

"Two years after the date hereof, for value received, we promise to pay Lucinda Jones, or order, the sum of four

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(*r*) The question whether an instrument is a sealed or unsealed one, is of no importance in Iowa since the statute abolishing the distinction between the two classes of contracts.

hundred dollars, for the payment of which we bind ourselves, our heirs, &c. Witness our hands, this 14th day of April, A. D. 1838.

"CHARLES MADERA [SEAL],
"WM. GUFFY [SEAL],
"SOLOMON SHERFEY [SEAL]."

"I do assign the within note to Geo. W. Jones.

"LUCINDA JONES [SEAL]."

Also endorsed, "G. W. Jones."

The declaration is in the usual form, setting out the writing obligatory the endorsements, &c., with a copy subjoined.

Plea, *non est factum*.

Judgment at February term, 1841, for plaintiff, for $400 debt, and $25.65 damages and costs.

*The defendants below seek to reverse the judgment *205 for the following errors assigned:—

1. The declaration sets forth a writing obligatory as the ground of action, and the writing given in evidence, on which judgment is rendered, is a promissory note.

2. There is a variance between the writing declared on and the one given in evidence, in this; to-wit: the declaration sets out a writing signed by Charles Madera, William Guffy, and Solomon Sherfey, and the writing produced is signed by Charles Madera & Co., William Guffy and Solomon Sherfey.

3. The judgment is against Charles Madera, *et al.* and not against the defendants by the names in which they were sued.

D. RORER, for plaintiffs in error.

M. D. BROWNING and GRIMES & STARR, for defendant in error.

Charles Madera *et al.* *v.* George W. Jones.

By the Court, Mason, Chief Justice.— The errors assigned in this case, are: —

1. The declaration sets forth a writing obligatory as the ground of action, and the writing given in evidence and on which judgment is rendered, is a promissory note.

2. There is a variance between the writing declared on and the one given in evidence, in this; to-wit: the declaration sets out a writing, signed by Charles Madera, William Guffy and Solomon Sherfey, and the writing produced is signed by Charles Madera & Co., William Guffy, and Solomon Sherfey.

3. The judgment is against Charles Madera, *et al.* and not against the defendants by the names in which they are sued.

In regard to the first error assigned the argument for the plaintiff in error proceeds upon a false basis. The law in force at the time the contract was made must determine whether the instrument was under seal or not. It is true, that subsequent legislation might so far have affected the contract as to have authorized assumpsit to be brought, where debt only lay at the time the instrument was executed. This relates merely to the remedy. But so far as regards the substantive features of a contract, an instrument once under seal is always under seal.

The law in force at the time this instrument was executed gave to every instrument to which the person executing the same should affix *any device by way of seal*, the same force and obligation as if it were actually sealed. See Michigan statutes, page 516.

*206 *Any device, therefore, which intimates the intention of the party to that effect, is sufficient to render the writing a sealed instrument. From the copy of the writing sued on, as set forth in the record, it appeared that not only is a scrawl affixed to each of the names of the parties executing it, but the word "seal" is written within

each of these scrawls. This, we think, is clearly sufficient to show that these devices were affixed by way of seal, and that the instrument was, therefore, a writing obligatory.

The second error assigned would be material, were not a correct copy of the instrument appended to the declaration. The case, in this respect is, therefore, brought within the rule adopted in that of Walker & Eno *v.* Ayres. The objection for a variance comes too late.

The third error assigned seems founded on a mistake in point of fact.

The transcript of the record shows that judgment was rendered against all the defendants, by their names set forth in full.

The judgment below will, therefore, be affirmed.

THE UNITED STATES, plaintiff, *v.* RICHARD EVEREST, defendant.

Certiorari to Henry.

A private prosecutor on an indictment for larceny is not an incompetent witness, although the money alleged to have been stolen belonged to the prosecuting witness, and upon a conviction of the thief would be entitled to recover from him double the amount stolen, and liable for the costs if the accused should be acquitted (*s*).

H. T. REID, district prosecutor, comes and says, there is manifest error in the record and proceedings in this; to-wit: —

(*s*) The question in this case is rendered obsolete by the statute changing the common law rule, that a direct, certain, legal interest in the result of an action rendered the witness incompetent. See Rev. ch. 159.

1. Because the Court below refused to allow the testimony of Alexander McClintock, whose name was indorsed on the indictment as private prosecutor, to be given to the jury on the part of the prosecution.

2. Because the Court refused to allow the testimony of Alexander McClintock, to whom the money charged in the indictment to have been stolen belonged, to go the jury on the part of the prosecution.

*207 *J. C. HALL, Esq., attorney for Richard Everest, defendant.

The defendant contends that McClintock's interest excludes him from being a witness. The interest is created by the statute. The statute gives the person from whom the goods or property is stolen double value if he convict, and if he does not, punishes him with the costs. It is a reward for perjury — a species of policy that can have no favor from the Court. In England, from whence we derive our law, there is a kind of state policy, and means not sanctioned by either humanity or justice, often resorted to in order to sustain that policy. On the contrary, our Courts have always been tender of the accused, and will be slow to sanction a principle that can by possibility be used by the corrupt to convict the innocent.

H. T. REID, for the United States.

In reply to the argument on the part of the defense, it is urged on the part of the prosecution, that the same policy exists in this country in relation to the admission of the testimony of a prosecuting witness which has so long prevailed in England; and that the reasons upon which that policy is founded applies with equal force in this country, as the protection of property and the morals of the community are of as much importance in a republic as they can be in a monarchy.

All the English authorities are with the prosecution, and if there are any American decisions to the contrary, they have not been produced, and we think such cannot be found. So far have the Courts gone in this country, that even the party to a forged instrument has been held admissible as a witness. See 3 Mass. 82; 6 Cowen, 27; 2 New Hampshire, 480; 2 Dallas, 239; 3 McCord, 442; see Greenleaf's new work on evidence, page 406.

Per Curiam, Wilson, Justice.— Everest was indicted in the Court below for larceny, in stealing the goods and chattels of Alexander McClintock, who was endorsed upon the indictment as private prosecutor. The defendant pleaded not guilty; and upon the trial in the Court below McClintock, the private prosecutor was produced, sworn, and offered as a witness by the district prosecutor, to which the defendant objected, —

"1. Because the name of said witness was endorsed on said indictment as private prosecutor.

"2. Because the money in the said indictment charged to have been stolen, is charged to have belonged, at the time it was stolen, to the said witness."

*Which objections were sustained by the Court, and *208 the testimony of said witness excluded. The excluding the testimony by the Court for these two reasons are the errors assigned, and the sufficiency of these grounds is submitted to this Court. Does the fact that the witness is the private prosecutor exclude his testimony? The private prosecutor is not necessarily bound for the costs, in the event of the acquittal of the defendant on the trial. The last statute enacted on this subject, and the one by which we are governed, provides: "When any prosecution, instituted in the name of the United States, or of individuals, for breaking any laws of this territory, shall fail, the judge shall determine from the circumstances whether the prosecutor, the county, or the territory shall pay the costs."

Statutes, vol. 1, act concerning costs, sec. 19. But if he were liable for the costs, that fact should go to the credibility, and not to the competency, of the witness; and so says the great current of authorities.

In reference to the second objection, the statute enacts, "If any person or persons shall steal from any other person or persons, or from the dwelling house, or other houses, or from any boat or water craft of any person or persons, any money, goods, wares, or merchandise, or any other personal property or thing whatsoever, he, she, or they, so offending, shall be deemed guilty of larceny, and, upon conviction thereof, shall, for the first offence, restore to the owner the thing or things stolen, and pay to him the value thereof; and if the thing stolen be not restored, shall pay to him, her, or them double the value thereof, and shall be fined in any sum not exceeding double the value of the thing stolen, and shall be imprisoned for a term, not exceeding five years, nor less than one year." Statutes, vol. 1, act defining crimes, sec. 35.

It is now well settled, that this, also, from the necessity of the case, must go to the credibility, and not to the competency, of the witness.

The Supreme Court of Illinois, in the case of Noble *v.* The People (Breese's Rep. page 29), holds as follows:—

"From necessity and public policy the person on whom a forgery is committed must be admitted to prove it; although our statute gives such person one half of the judgment so recovered against the accused. If this were not the law, forgeries would go unpunished. This interest must be left to his credit."

We see no such distinction between this case and a case of forgery as would admit the witness in one case and exclude him in the other. If forgeries might go unpunished unless the injured party were admitted, so also, might
*209 cases of larceny and robbery, where the person *injured could alone testify to the circumstances. In

the case of The Commonwealth *v.* Moulton, 9 Mass. Rep. 30, it was decided that "One from whom goods had been stolen is a competent witness on the trial of the thief, although he is entitled by statute to satisfaction from the future earnings of the convict, and a recompense from the public treasury for the expense of prosecution." A person entitled to a reward upon the conviction of the defendant is not thereby rendered incompetent to give evidence against him (Rex. *v.* Muscot, 10 Mod. 193), whether the reward be given by statute, by proclamation, or by a private person. 1 Phil. Ev. 119, 127.

The prosecutor is in all cases to prove the offense (Peake's Ev. 153, 155; see Gilb. Ev. 123), even although he entitles himself to the restoration of his goods upon the conviction, or entitles him to costs by the conviction.

The judgment below is reversed.

Mason, Chief Justice, Dissenting. — The question we are now called upon to decide is whether, in the trial below, Alexander McClintock was a competent witness for the prosecution. His name had been indorsed on the indictment as a private prosecutor, which rendered him liable for the costs of the prosecution, in case of an acquittal. He was, besides, the owner of the money alleged to have been stolen. A conviction would have entitled him to receive from the defendant double that amount, which in this case would have made up a sum of more than five hundred dollars. He had, therefore, a double pecuniary motive to swear against the accused as strongly as possible. If either or both of these are sufficient to exclude his testimony, the decision below was correct — otherwise, not.

In civil cases, the smallest amount of direct pecuniary interest in the result is sufficient to disqualify a witness, and the same doctrine, as a general rule, applies to criminal cases. "Thus, in cases of summary convictions, where a penalty is imposed by statute, and the whole or a part

is given to the informer or prosecutor who becomes forthwith entitled to it upon the conviction, he is not, at the common law, a competent witness for the prosecution. So in a prosecution under the statutes for a forcible entry and detainer, where the party injured is entitled to an award of immediate restitution of the lands, he is not a competent witness. This rule, however, is subject to many exceptions, which will hereafter be stated. But it may be proper here to remark, that in general, *where the pen-*

*210 *alty or provision for restitution is evidently *introduced for the sake of the party injured, rather than to ensure the detection and punishment of the offender, the party is held incompetent.*" 1 Greenleaf's Evidence, 448.

Now, it seems to me that the decision in the District Court was in perfect accordance with the rules here laid down. The penalty or provision for restitution in this case was evidently "introduced for the sake of the party injured, rather than to ensure the detection and punishment of the offender," unless, indeed, we suppose the weight of the inducement would increase the strength of the witness's testimony. Such a motive, however, cannot be attributed to the legislature, and if such a result *is* to be prodnced from this cause, it certainly furnishes no argument in favor of the competency of the witness. As well might subornation of perjury be directly and openly resorted to for the purpose of securing a conviction.

The case at bar is parallel also with the examples given in the above quotation. If, where the whole or part of the penalty is given to the prosecutor in *qui tam* actions, he is incompetent, why should he not be so also in the present case, where on the one hand he is to receive double the amount of money which, perhaps by his own oath, the defendant may be convicted of having stolen; and, on the other, is threatened with a bill of costs of perhaps a greater amount, if the defendant is acquitted. And if the restitution of the lands is sufficient to destroy the competency of

the prosecutor, it is difficult for me to perceive why the restitution of stolen money should not have a like effect—*a fortiori*, when double the amount stolen is to be restored.

On the other hand, there are many decisions which seem in conflict with those above mentioned, and some of them really are so, but most of them can be easily reconciled with that of the Court below. Where the government offers a reward for the conviction of offenders, the person who will be entitled to this contingent reward is still a competent witness. But this is in strict accordance with the rule above quoted from Greenleaf. The object of the reward in this case is to ensure the detection and punishment of the offender, rather than as a favor or compensation to the witness. The intention of the legislature in offering the reward would be frustrated, if the evidence of the main witness in the case were thus to be declared inadmissible.

It is also evident that rewards offered by private individuals cannot render one incompetent, for otherwise the friends of the accused might readily shut the mouths of all the witnesses for the prosecution.

Witnesses are also clearly competent to whom pardons or exemptions *from prosecution are offered by *211 statute, on condition of their giving such testimony as to convict their accomplices. The rules of evidence are all under the control of the legislature, but the question before the Court is, what shall be the rule where the legislature have not directly expressed their will on the subject?

In cases of forgery, the English doctrine was to exclude the person whose name was alleged to have been forged; and this continued to be the case until changed by statute. A different rule has, in general, been followed in this country, and with great propriety; for the record of conviction will not be evidence in a civil suit against the witness on the forged instrument; and, although such conviction

would operate strongly in his favor, this is a circumstance that should only go to his credibility.

But there are decisions, I am well aware, to the effect that the competency of a witness in a criminal prosecution may not be destroyed, although he may have a direct pecuniary interest in the result of the trial, and although that interest is created by law for the sake of that very witness, rather than to secure the detection and punishment of the offender. Thus, the Supreme Court of Illinois have declared the person whose name has been forged, a competent witness, although he were to receive a pecuniary compensation immediately dependent upon the conviction of the offender, and there are some other decisions involving a similar principle. I cannot, however, find that such decisions have become so generally acquiesced in as to become the established law, and, from the fact that a different rule has been laid down in the most recent work on evidence, and that, too, by an American author, I am inclined to doubt whether such is really the weight of authority in this country. See Greenleaf's evidence above quoted.

Where authorities are thus discordant, we should resort to principle by which to guide our decision. In fact, it seems to me that reason should, in such cases, be appealed to in the first instance, relying upon authority to direct us only where our natural guide becomes incompetent. To bow blindly to any decisions, however respectable, is to subject ourselves to the risk of misapplying those decisions, of improperly engrafting them upon statutes different from those to which they naturally apply, and, at all events, of keeping alive abuses and absurdities which such a course will inevitably create and perpetuate in any branch of science. Frequently, at all events, we should, in nautical language, "*take an observation*," to determine by the fixed and unvarying lights above whether some uncalculated cur-

rent of authorities is not drifting us from the great object we are endeavoring to reach — the *adminis- *212 tration of justice. This is more particularly important when we are founding a judicial system for an independent community. The decisions of other Courts should be treated with high respect, but they should be regarded in the light of wise counsellors rather than that of arbitrary sovereigns.

Bringing this question, then, to the test of principle, what will be the result? One of the best settled principles of our jurisprudence is, that no person is a competent witness in a cause in the result of which he has a direct pecuniary interest; and, although it may be questionable whether this rule, in all its strictness, has a salutary operation in civil suits, there is no doubt of its wisdom and justice in criminal prosecutions. Where the character and liberty of an American citizen is at stake, testimony of a suspicious character should never be resorted to for the purpose of conviction. Where a man's coat is the subject of a suit at law, we exclude a witness who has the slightest interest in the result of the trial, but where his whole body, his very life, abide such result, it is said we should not object to the competency of the witness who, by a false oath, may entitle himself to the whole fortune of the accused. Heirs have murdered their ancestors for the sake of the inheritance. Doubtless, if an opportunity had offered, they would have sworn him into the penitentiary with a like motive. That is a most dangerous law which enables a stranger, by his own turpitude, to become the heir of the accused, and secures him the immediate inheritance.

But it is said this course is resorted to from motives of public policy, and from the necessity of the case. If it is so necessary to secure a victim he might, perhaps, be sentenced without the forms of a trial! But this is not the case. The law calls for no such sacrifice. Its highest,

noblest, most favorite exercise is the protection of the innocent. It asks for the punishment of none but those who are clearly guilty. It condemns reluctantly, and only when the evidence is strong, unequivocal, uncontaminated. It should listen to none that is not strictly credible. Hired informers, witnesses employed to swear by the job, are wholly incompatible with that system of law and liberty which it was the design of the revolution to establish.

It is true that if the owner of stolen property is excluded from being a witness, cases would arise in which offenders would on that account escape deserved punishment; but even that is far better than punishing the innocent. Shall we for fear of such a failure to convict, break through a most salutary principle? It is not *our* business to
*213 make *laws for preventing the guilty from escaping.

Where there is a strong necessity arising out of the nature of things, we should be justified in establishing such an exception to any general rule of evidence as to further the ends of justice. But such is not the case here. "The necessity of the case," if any such exists, arises wholly out of the act of the legislature. What necessity was there for giving the owner of the stolen property a double compensation, or even any compensation at all, as the direct result of a conviction. If he had been left to obtain satisfaction for his private injury in the same way as in the case of an ordinary trespass he would have been a competent witness in the trial for larceny. By uniting the two proceedings it would be charitable and just to presume that the legislature intended to exclude the owner of the property as a witness altogether, rather than that they meant to give him an opportunity to swear money into his own pocket, if he would so shape his testimony as to murder the reputation of the accused, and consign his body to the penitentiary. Whether such a law was wise or politic, this is not the proper place to inquire, nor are we the proper tribunal to decide. Our duty is to carry out the

spirit and intention of the legislature by the application of the general principles of law; not to create exceptions to a salutary rule of evidence for the purpose of curing what may seem to us defective legislation.

It is not difficult to perceive that the establishment of the rule allowing the owner of the stolen goods to be a competent witness, may lead to very great injustice. If there is any reason for excluding an interested witness in a civil case, that reason operates with infinitely more force in criminal prosecutions. It is sometimes difficult to determine whether an act is a simple trespass or a downright larceny. If the transgressor is proceeded against as a mere trespasser, the owner cannot be a witness. The rule, therefore, holds out a very strong inducement to him to institute a criminal proceeding and follow it up by such an oath as will entitle him to a double compensation.

How often, by the force of accidental circumstances, do the strongest suspicions of guilt rest upon an individual wholly innocent. In such a case allow the party injured to become a witness, with the double motive of obtaining a pecuniary benefit on the one hand and avoiding a bill of costs on the other, and suspicion will very probably be changed to conviction.

But this rule furnishes opportunities for plans to be laid by the crafty and unprincipled for the very purpose of entrapping the simple and unsuspecting. An article of property may be loaned with the formed *design of *214 charging the borrower with theft, and obtaining the double compensation. Foreigners and other strangers often arrive in this territory with considerable sums of money. An unknown wretch, ascertaining the exact amount and description of the prey which the law has kindly placed within his reach, has the astonished owner arrested — charges him with theft — consummates his villainy with perjury, which consigns his victim to the penitentiary, and then seizes upon his spoils, the officers of the law in the mean time aiding him in his infamous purpose.

Cases like these may never occur — neither might any failure of justice result from enforcing the rule which excludes all interested witnesses. Either of these evils are, however, liable to be experienced according as that rule is enforced or rejected. Against which is it most important to guard? It will be said that those of the latter class are much more likely to occur than those of the former, but do the respective probabilities present an inequality of ninety-nine to one, the ratio which the humanity of the law establishes in favor of innocence.

This is the train of reasoning which gave rise to the decision below, which has now been reversed by this Court. All the arguments I have since heard have been insufficient to change the opinion then formed. I therefore feel compelled to dissent from the opinion of the Supreme Court, and have concluded in this manner to set forth the reasons of that dissent.

ROBERT CHALFONT, plaintiff in errror, *v.* THE UNITED STATES, defendant in error.

Error to Des Moines.

The act making it indictable to cut timber off the school lands, is not contrary to Organic Law.

The legislature has power to punish all injuries to real estate as misdemeanors, even though the lands belong to the United States.

GRIMES & STARR for plaintiff in error.

H. T. RIED, district prosecutor, for defendant in error.

*215 *The points involved are sufficiently stated in the opinion of the Court.

PER CURIAM, MASON, CHIEF JUSTICE. — The plaintiff in error was indicted under a statute of this territory for cut-

ting and carrying away timber from a certain sixteenth or school section of land, in the county of Des Moines. To this indictment he pleaded in abatement, that the said sixteenth section was public lands of the United States, and not school lands or the property of the territory of Iowa.

This plea was demurred to, and the demurrer sustained by the Court, which is the substance of all the errors assigned in the case.

The only ground for reversing this judgment is the alleged invalidity of the statute. It is said to be a violation of the Organic Act, and consequently void. But does it, as alleged, in any manner interfere with the primary disposal of the soil? It is a penal statute, punishing as a misdemeanor, any one who shall commit certain trespasses upon a particular class of the public lands of the United States. Our laws render larceny criminal, but whoever supposed those laws in any manner interfered with the disposal of the property, which is thus made the subject of larceny? They leave the entire control of the property in the owner, and merely throw around him an additional safeguard — the undisturbed enjoyment of it.

The laws of some of the states of the Union render the felonious cutting down and carrying away of timber, exceeding in value a certain amount, larceny. Does that law in any manner encroach upon the rights of property of the respective owners of real estate? Would it not be so if enacted in this territory? Would it be a usurpation of power in our legislature to extend this protection, as well to the timber growing upon the public lands of the United States as to that owned by private individuals? If such a law would be valid, when applied to all lands in the territory, would it not be equally so when limited to a particular class of those lands? And if a law of that kind would be within the legitimate province of legislative power, why is the law in question *without* it?

The answers to all these questions seem to us evident

to establish the right of our legislature to punish trespasses upon the sixteenth sections in the manner pointed out by the statute. As a general rule, the legislatures are the sole judges as to what act ought to be prohibited, and to their wisdom is entrusted the power to punish or otherwise prevent them. Legal restraints may be carried so far
*216 as to generate into *tyranny, and there is no doubt but they may finally become so wanton, so outrageous, so repugnant to the spirit of that liberty which is our birthright, as to cease to be obligatory; but the line of demarcation which limits legislative power in this direction, need not be drawn in the present case. No right has been restrained, but there is merely provided an additional preventive of wrong.

Legislation on this subject has not been wanton or needless, but has been guided by a strict regard for the general welfare. True, these may not be strictly "school lands." The title is still in the general government, and they may still be diverted to a different purpose. But there is a moral certainty that at the proper time they will be granted to the State for the support of schools. With this express object they have been reserved from sale, and have been regarded by Congress as devoted to that object, and without a flagrant breach of good faith to our citizens, their destination cannot be changed. Under these circumstances, the public — that is to say, all the inhabitants of this territory — have a strong interest in the preservation of those lands from spoliation. The legislature, as the organ of the public will, and the guardian of the public interest, would have been wanting in its duty if it had suffered this magnificent patrimony to become wasted and rendered valueless. To prevent this, is clearly a "rightful subject of legislation."

The right to pass this law is compared to the right, or rather incapacity of the heir, to maintain the action of trespass before the death of his ancestor. And suppose

the legislature was to confer on him that right, could he not then maintain the action? The counsel for the plaintiff in error seems to treat this case as though, under the general law, the territory of Iowa had brought an action of trespass against their client, for an injury done to the property of another. They test the question by the rules of Court rather than by the great land-marks of legislation; forgetting that that the legislature is all but omnipotent over the rules of legal proceedings, as well as over many other subjects. How many acts, in themselves innocent, are prohibited and made misdemeanors by statute? Unless in extraordinary cases, no one ever questions the power of the legislature in such cases. But where prohibitions and reasonable penalties are provided for acts *morally wrong*, the validity of such laws must surely be evident. The present case is of that class.

It is contended that the statute prohibiting trespasses upon school lands interferes with the primary disposal of the soil, because its fifth section exempts from its penalties those living upon the school *sections, and *217 who shall only cut the timber necessary for fencing, building, fire-wood, &c., but we cannot reach such a conclusion from such premises. The law does not decide who may, or who may not, occupy any portion of the public lands. It meddles not with the question of occupancy any more than it does with that of higher titles. It treats every man's tenancy as though it were legal. The *bona fide* tenant is permitted to do all that is necessary to keep the premises in repair, and keep up his occupancy, but if he commits waste, or if any other person is guilty of trespass, he is made liable. Upon the presumption that every occupant is legally in possession of the land he occupies, the law does nothing more in relation to those lands than convert a civil liability into a misdemeanor. Those are exempted from the penalty, who would be justified civilly. It would be clearly in the power of the legislature to abolish all civil

remedies and to transform all cases which give rise to actions *ex delicto* into crimes and misdemeanors; and all this without interfering with the rights or primary disposal of the property. It is also contended that, inasmuch as Congress, by the act of 1807, have legislated in relation to trespasses upon all public lands, the present law is invalid. But even supposing that act to be in full force in relation to the school lands, it does not reach a case of this description. It is aimed at the *settlers* upon the public lands, and authorizes their removal; but provides no remedy for the destruction of timber by persons having legal residences elsewhere than upon the lands wasted. We conclude, therefore, that it would be competent for the legislature to punish all willful injuries to real estate as misdemeanors; that this power extends as well to lands owned by the United States, as to that belonging to individuals. That it may be lawfully limited to a particular class of trespassers, and that the condition of the sixteenth sections of land in this territory, is such as morally to justify the action of the legislature on this subject. The judgment below will, therefore, be affirmed.

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*218 *John J. Hodgen, plaintiff in error *v.* The United States, defendant in error.

Error to Jefferson.

The act making it indictable to cut timber off the school lands is not contrary to the Organic Law.

John James Hodgen was indicted for unlawfully cutting down, destroying, and hauling from off the sixteenth section, in township number seventy-three, north of range eight west, in Jefferson county. To which there was a general demurrer. The demurrer was overruled.

The case was submitted to a jury on the plea of not guilty.

Verdict guilty, and the value of the timber taken assessed at ten dollars.

The defendant, by Teas, his attorney, then moved in arrest of judgment, because,—

1. The statute upon which the indictment was founded was contrary to the Organic Law.

2. There was no property or interest vested in the sixteenth section, in the territory of Iowa, that would authorize the legislature to legislate upon the subject.

3. The act of the legislature was void because the Congress of the United States had passed a law making it penal to cut, destroy, or haul off timber from any of the public lands, and the trial and conviction in this case cannot be pleaded in bar to an indictment under the laws of the United States.

The motion in arrest was overruled, and the defendant fined twenty dollars and costs.

To reverse this judgment the defendant below brings his writ of error to this Court.

J. B. Teas & J. C. Hall, for plaintiff in error.

H. T. Reid, for defendant in error.

Per Curiam, Mason, Chief Justice.— This case presents no point not decided in the case of Chalfont *v.* The United States. We shall, therefore, merely refer to that decision.

Judgment affirmed.

*219 *WILLIAM J. A. BRADFORD, plaintiff in error, *v.* THE BOARD OF COMMISSIONERS OF JACKSON COUNTY, defendants in error.

Error to Jackson.

An action against a board of county commissioners, for services rendered as a district prosecutor, cannot be maintained.

This was an action of assumpsit, commenced in the District Court of Jackson county, for services rendered in said county as a district prosecuting attorney.

The defendant filed a plea in abatement: That the Court ought not to have and entertain jurisdiction of the cause, nor of the matters in the plaintiff's declaration, —

1. Because, by the law of the territory creating the office of prosecuting attorney, the amount to be recovered by said attorney is left discretionary with the board of county commissioners of the different counties.

2. The defendants were invested by law with full discretionary power, as to regulating and allowing the amount to be received by said public prosecutor. And no jurisdiction is given, or does belong to the District Court, to hear and try the matter.

3. That the District Court can only entertain jurisdiction of such matters in the form of appeal from the decision of the board.

To which plea the plaintiff demurred, specially, —

1. Because said plea does no where show any fact, matter, or thing, by reason whereof the jurisdiction of the Court over matters of contract should be restricted in the present case.

2. It does not appear, nor is it averred, whether the parties to the action, the subject matter thereof, the amount in

controversy, or the venue laid are without the jurisdiction of the Court.

3. It no where states by what law or authority the board of commissioners have a discretionary power, so as to exclude the jurisdiction of the Court and trial by jury, as in other cases.

4. The plea does not state what Court or judicial tribunal has cognizance of this cause.

*5. The plea does not show the defect of jurisdic- *220
tion in the District Court.

6. The plea presents no traversable matter, and if traversed, no issue could be formed.

7. That said plea is not signed by the party pleading, as by law it should be.

8. That the plea is by attorneys, and thereby the jurisdiction of the Court is admitted, &c.

The demurrer was overruled, and a judgment for costs rendered by the Court below against Bradford, the plaintiff.

The plaintiff sued out his writ of error from this Court, and for error assigns: —

1. The Court erred in sustaining the plea of the defendant.

2. The Court erred in deciding that the board of commissioners of Jackson county were not liable to be sued, because an appeal lay from the doings of the board of commissioners of the several counties in the territory to the District Court.

3. The Court erred in deciding that the present action against the board of commissioners of Jackson county could not be maintained, because, by the law creating the office of district prosecutor, it was made discretionary with said board what amount should be paid to said district prosecutors.

William J. A. Bradford *v.* The Commissioners of Jackson County.

BRADFORD, *in propria persona*, in support of the errors assigned, contended,—

1. That the board of commissioners of the several counties are corporations, both by common law and by statute. Am. Com. Law, til. Corp.; Iowa Stat. p. 102, § 4, 1839.

2. It is incident to a corporation to sue and be sued. Bacon Abr. Corp. D. It is the practice in the United States to sue counties. 7 Mass. R. 461, Hawks *v.* Kennebeck county; 11 Mass. R. 220, Brown *v.* Somerset.

3. That the statute declares that the boards of commissioners of the several counties may sue and be sued, Iowa Stat. 1839, p. 102, § 4; and precribes the mode of serving writs upon them, Stat. December 31, 1840, p. 20.

4. The second reason for overruling the demurrer is inconsistent with the first. If the law allows an appeal, then there is no such absolute discretion in the county
*221 commissioners as the decision below *contemplates.

An appeal is as fatal to such discretion as a suit commenced by declaration and summons.

5. The law does not know any absolute discretion. 1 Blackf. 50.

6. The constitution guarantees the right of trial by jury. 1 Blackf. 5, Vanblancan *v.* Ward; 18 John. R. 418; 6 Harris and John. 475.

DAVIS, for defendants.

The only point which is perceived in the case arises out of the construction to be given to the fifth section of the act respecting district prosecutors, pages 178 and 179, Revised Statutes. Its language is, "District attorneys shall receive such compensation for their services as the board of county commissioners of their respective counties shall from time to time deem proper, either as an annual salary or by making payment on bills for services rendered, as they shall judge best." The duty of the commissioners, by this section, is clearly pointed out. The measure of

compensation is given, and it is such sum as the commissioners shall from time to deem proper. Without some violation or omission of duty the commissioners could not be sued, unless upon contract. No contract can be presumed against their duty. Their duty is to allow such sum as they deem proper. No other sum can be taken to be due. It follows that the claim for the services must be ascertained by the measure prescribed by the law to ascertain it. Nothing appears by the record that the claims set up by the plaintiff have been thus ascertained, and until thus ascertained, there is no legal liability on the part of the commissioners to pay any particular sum. The amount is at their discretion, and if *bona fide* exercised upon the case, upon presentation would fix the amount.

It is not denied that if the commissioners, upon the presentation of the claims for the services rendered them, had acted in bad faith, their duty might be enforced by the proper legal proceeding. But there is extreme doubt whether the proper or legal remedy would be by action of assumpsit. Under the statute no other contract can be presumed, for compensation to district prosecutors, than the one prescribed, which is to pay the sum such commissioners shall deem proper.

By the Court, Wilson, Justice. — It is not necessary to consider the errors separately, as the solution of one question will decide this case. That question is this: Whether the district prosecutor can commence and maintain a suit, in the District Court of Jackson county, for his services, against the county commissioners of that county.

*The fifth section of the "Act for the appointment *222 of district prosecutors, and defining their duties," enacts, "that the said district attorneys shall receive such compensation for their services as the board of county commissioners of their respective counties shall from time to time deem proper, either as an annual salary, or by

making payment on the bills for services rendered." This section contemplates an exercise of the discretion of the county commissioners; not only as to the amount of compensation, but as to the time of payment.

It is left to their discretion as to the amount; for it provides that "the district prosecutor shall receive such compensation as the board of commissioners shall deem proper," and also, as to the time, for it further provides that the compensation may be as an annual salary, or by making payment on the bills for services rendered, as they (the commissioners) shall judge best.

This suit, as appears from the declaration, was brought for the services of the district prosecutor, at the October term, 1840, of the District Court for Jackson county; and there is no averment of a neglect on the part of the county commissioners to act in the premises — no averment of a demand. Would it not be a sufficient compliance with this statute if the commissioners would make an allowance to the district prosecutor, as the salary for a year, commencing after a specified time? We think it would. If so, can the prosecutor bring an action for a week's service? If he can, then that part of the statute which says that they may make him the allowance as an annual salary, or upon bills rendered, as they may deem proper, would be a nullity; for, by bringing suit for one week's service, and recovering the valne thereof, he takes away the discretion vested by law in the commissioners, both as to the amount of compensation and as to the time of payment. In the act referred to, no provision is made for a review of their decision in the District Court. The fourth section of the act "organizing a board of county commissioners in each county in the territory of Iowa," is relied on by the plaintiff in error as authorizing the institution of this suit. This section, after enacting that the board of commissioners may sue in their corporate name, provides that the board "may in like manner, by and under their corporate

name and style, be sued by any person or persons having any manner of claims against said county." This statute was passed December 14, 1838, and the statute in reference to the district prosecutor, which vests the discretion in the board of county commissioners, was passed January 15, 1839. That these statutes conflict, no one will deny; and if *so, then the last must stand; especially as it *223 refers to the particular case, while the other is general.

Whether the discretion vested in the commissioners is of that absolute character as to preclude the right of a rehearing in the District Court, either by an appeal under the general provision allowing appeals from the decisions of the boards of county commissioners, by persons aggrieved by such decisions, or upon a mandamus to such board; whether the discretion vested in the county commissioners is such a discretion as a Court may exercise, in regulating its proceedings, or whether the county commissioners are bound to allow a reasonable compensation, such as a reasonable man would think the prosecutor ought to have for his services, it is not necessary in this case to decide, as the questions are not presented by the record. We decide all the questions presented in this case when we say that the discretion of the commissioners must be first exercised in reference to the matter, and that the fifth section of the act in reference to district prosecutors precludes the idea of their commencing suit against the county commissioners in the District Court, by declaration and summons.

The judgment below is affirmed.

PETER A. LORIMIER and CHARLES H. GRATOIT, impleaded with George W. Campbell and Dickinson B. Morehouse, plaintiffs in error, *v.* THE PRESIDENT, DIRECTORS AND COMPANY OF THE STATE BANK OF ILLINOIS, defendants in error.

Error to Dubuque.

The District Courts of this territory are not District Courts of the *United States*, properly speaking, but Territorial Courts, having the powers of such Courts (*t*).

The appearance by attorney, and filing a plea with another defendant, dispenses with the necessity of service of process upon him, and is a waiver of all objections on that score.

This was an action of assumpsit, founded on a promissory note, given by C. H. Gratoit & Co., and Campbell
*224 & Morehouse to the President, *Directors and Company of the State Bank of Illinois, for twenty-eight hundred aud fifty dollars, dated February 18, 1840, and payable sixty days after date.

To the writ of summons in this case issued, the sheriff returned "served by delivering an attested copy thereof to Peter A. Lorimier, this 20th day of October, A. D. 1840. Charles H. Gratoit, George W. Campbell, and Dickinson B. Morehouse, not found in my county."

The plaintiffs declared against Charles H. Gratoit and Peter A. Lorimier, late partners, doing business under the name and style of C. H. Gratoit & Co.; and George W. Campbell and Dickinson B. Morehouse, late partners, doing business under the name and style of Campbell & Morehouse. To the special count on the note was added a count for money had and received.

The defendants, by Hempstead and Bradford, their at-

(*t*) To the same effect is the present statute. Rev. § 2840; Wilsey *v.* Maynard, 21 Iowa, 107.

torneys, moved to quash the said writ and dismiss the proceedings, because there was variance between the plaintiffs' writ and declaration therein, in this, that the declaration stated and set forth the defendants, Charles H. Gratoit and Peter A. Lorimier, to be partners, trading under the firm of Charles H. Gratoit & Co., and the defendants, George W. Campbell and Dickinson B. Morehouse, to be partners, trading under the firm of George W. Campbell & Co., whereas the writ was against the said parties individually, only, and not against the said Gratoit and Lorimier as partners, nor against the said George W. Campbell and Morehouse, as partners. Which said motion to quash was overruled by the Court.

The said Peter A. Lorimier, one of the defendants, impleaded, &c., in his own proper person then pleaded to the jurisdiction of the Court, and that it ought not to have or take further cognizance of the action, because that the said Court sitting in its said capacity of a District Court of the United States, had not, nor could exercise any jurisdiction of the matter set forth in the plaintiffs' declaration, and averred that there was another Court established by law which was legally authorized to hear and determine pleas in assumpsit, debt, and issues arising thereon exclusively of the United States District Court or any other tribunal, to-wit: the District Court of said territory, being the law of Congress of the United States for organizing said territory, and by the laws of said territory, that said Court had by law exclusive cognizance and jurisdiction of the action of said plaintiff. Which plea was overruled by the Court.

The defendants then pleaded the general issue.

*At the May term, 1841, the defendants having, by *225 leave of the Court, withdrawn their plea, judgment was awarded the plaintiffs for the sum of $3,042.22 damages and costs.

The points reserved in the bill of exceptions taken in this case are, —

1. That the Court ruled and decreed that in a common plea of assumpsit, the proceedings may be entitled of the District Court of the United States.

2. That the style and name of this Court, as a District Court of the United States, refers only to the source whence its power is derived, and not to the legal title and description of the Court when entertaining jurisdiction of such matters and things arising under the constitution and laws of the United States, jurisdiction whereof is vested in the Circuit and District Courts of the United States; and that by said name and style of the District Court of the United States, it may have jurisdiction of the present case.

The said Peter A. Lorimier sued out a writ of error from this Court, and has assigned for error the causes set forth in the exceptions taken in the Court below, and that Gratoit was not served with process.

HEMPSTEAD, for plaintiffs.

DAVIS & CRAWFORD, for defendants.

BY THE COURT, MASON, CHIEF JUSTICE. — There are substantially but two errors assigned in this case. The first that we shall notice is that the judgment was rendered against the said Gratoit without his having been served with process. He, however, made his appearance, by attorney, and filed his plea of the general issue jointly with Lorimier. This dispensed with the necessity of service, and waived all objections on that score. But the main question is that the Court below, *sitting as a District Court of the United States*, had no jurisdiction of the case. Counsel seem to be under a misconception as to the true nature of our District Courts. Under no circumstances are they, properly speaking, District Courts of the United

States. They are merely Territorial Courts, having the powers of District and Circuit Courts of the United States; but, when adjudicating upon the laws of Congress, their character and title does not change. Congress has, sometimes, for certain purposes, vested the State Courts with federal powers to a limited extent. That did not in the least deprive them of their character as State Courts. We are in a similar predicament.

*The only irregularity we observe in the proceed- *226
ings below is an inaccuracy in stating the title of the Court. It is entitled a District Court of the United States, but there the irregularity ends. All the proceedings are before the Territorial Court. The process is served by the sheriff, and nothing appears to have taken place out of the ordinary course of proceeding in other cases of like nature.

We think the inaccuracy in the entitling of the Court is not such an irregularity as should justify a disturbance of the judgment below. There is no pretence of a doubt as to the identity of the Court. The error is one which cannot prejudice the plaintiff in error, and, therefore, furnishes no ground for a reversal of the judgment below.

Judgment affirmed.

CURTIS M. DOOLITTLE, plaintiff in error, *v.* ANSON HARRINGTON AND OTHERS, defendants in error.

Error to Jackson.

The writ of right does not lie to recover the possession of a "claim" on the public lands.

This was an action of right in the District Court of Jackson county. At the October term, 1841, Curtis M. Doolittle declared against Anson Harrington, David Har-

rington, John E. Goodenow, Thomas Wright, Jr., and Cornelius Dunham, claiming a tract of land with the appurtenances, being in the county aforesaid, and described as follows: The west half of the south-east quarter of section 13, township 84, north of range 2, east of the fifth principal meridian, to which the said Curtis had right to the immediate possession, and to the ownership thereof as a *claim*, and also to damages for its detention, &c.

To this declaration the defendants demurred that it nowhere sets forth title, by which said plaintiff claims the immediate possession of the said property, and to the ownership thereof, and also that said declaration was in other respects informal and insufficient.

B. Rush Petriken, for plaintiff.

Henry Hopkins and T. Davis, for defendants.

*227 *Per Curiam, Wilson, Justice.—The question presented in this case for the consideration of the Court is whether the action of right, as given by our statute, can be brought to recover the possession of a "claim."

The second section of the act to allow and regulate the action of right, enacts, "that no person shall recover in this action unless, at the time of commencing it, he shall have had a *valid subsisting interest* in the property claimed, *and* the right to recover the immediate possession thereof." The word *claim* has a legal significance given to it by the statute, approved January 25th, 1839, entitled "An Act to prevent trespasses and other injuries being done to the possession of settlers on the public domain, and to define the extent of the rights of possession on the said lands." In this (and it is the only act upon the subject) the word "claim" is frequently used, and it refers to a portion of the public lands settled upon by an individual, to which he has no other right or title than that which arises from his settlement upon said lands.

This statute recognizes these "claims" and gives to the claimants the right to bring certain actions of trespass *quare clausum fregit*, trespass and ejectment, forcible entry and detainer, and forcible detainer. It also sets forth the amount of acres which may be embraced in a "claim," and directs what shall be done thereto by the claimant, in order to constitute a claim within the meaning of the statute. As the statute, therefore, gives the definition of a "claim," we think the Court below did not err in placing upon the word claim in the declaration the meaning given to it by the statute.

Is this "claim" such an interest in real estate as is referred to by the statute allowing and regulating the action of right? Is it a valid and subsisting interest? We think not. This claim may, under our statute, entitle the plaintiff to recover the "immediate possession" of the land, but not by bringing the action of right. The claim of the settler cannot be considered as good against any except those who do not show a better right. It is merely a temporary right to the possession, which may be defeated, either by the act of the government in dispossessing the settler, or by the purchase of the land by any person. It is not, therefore, in contemplation of law, a valid subsisting interest. Aside from anything contained in the statute allowing the action of right, the fact that the act to prevent trespasses and other injuries being done to settlers &c., enumerates what actions may be brought to protect these "claims," and does not mention the action of right, would *justify the conclusion that the latter *228 action could not be maintained, for "*inclusio unius est exclusio ulterius.*"

But the 20th section of the act to allow and regulate the action of right, enacts, "that the action of right being intended to supercede the action of ejectment, the writ of right, and the writ of dower, whatever might be given in evidence under the general issue in either of these actions

may also be done in this." This section strengthens the position that the valid and subsisting interest, necessary to support the action of right, must be something more than a "claim." The defendant, in the action of right, may give in evidence whatever would be proper in case the action was ejectment. What could he prove in the action of ejectment? "As the party in the possession of the property is presumed to be the owner of the same until the contrary is proven, it is necessary for a claimant in ejectment to show in himself a good and sufficient title to the lands, to enable him to recover them from the defendant. He will not be assisted by the weakness of the defendant's claim. The possession of the latter gives him a right against every man who cannot establish a good title; and if he can answer a *prima facie* case on the part of the lessor of the plaintiff, by showing the real title to the land to be in another, it will be sufficient for his defence, without also proving that he holds the lands with the consent or under the authority of the real owner. And the case will not be varied, although the lessor can prove that he has previously been himself in the possession of the premises." Adams on Ejectment, page 29.

We cite this, not only to show that the interest to be proven to be in the plaintiff must be such as would be sufficient to maintain the action of ejectment, and that a claim is not a sufficient interest to maintain ejectment, but also to show that the defendant in the action of right, upon the trial, by establishing the fact of ownership by the general government of the land in controversy, would be entitled a verdict. The judgment below is affirmed.

MASON, CHIEF JUSTICE.—I have no doubt of the power of the legislature to authorize the bringing of the action of right or ejectment to recover possession of a "claim," but the act relied upon by the plaintiff in this case has not that effect. The object of that act seems to be to place the settler on a "claim," in the same predicament as though the

whole were enclosed. The reference there made to the action of ejectment does not seem to me to justify the conclusion that the legislature intended to change the established law on the subject, in relation to the *ac- *229 tual right of possession of the plaintiff, but the word seems to have been inserted under the mistaken impression that the law previously in force would authorize an action of ejectment to recover the possession of an actual inclosure on the public lands, by the rightful claimant.

JOSEPH K. SNYDER, plaintiff in error *v.* JOHN A. ROPER, defendant in error.

Error to Cedar.

The writ of *certiorari* must be issued within thirty days after the judgment before the magistrate (*u*).

The Court will dismiss a *certiorari*, where the bond is filed in time, if the writ be issued after the expiration of the thirty days allowed by statute.

The case is sufficiently stated in the opinion of the Court.

S. C. HASTINGS, for plaintiff in error.

PER CURIAM, WILSON, JUSTICE.—This was an action commenced before a justice of the peace, by Roper against Snyder. Judgment was rendered by the justice against Snyder, on the 26th September, 1840, and on the 10th day of October following, the plaintiff made application for a *certiorari*, and filed his bond according to law, in the office of the clerk of the District Court. On the 14th day of the next November, the clerk issued the writ of *certiorari*. The Court below dismissed the writ of *certiorari*, because the writ was not issued within thirty days after the rendition

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(*u*) Not so under the Revision. See ch. 140.

of the judgment by the justice; which dismissal is the error assigned in this case.

The statute upon the subject of writs of *certiorari*, approved January 14th, 1846, section 13, provides, "that the party, or any of the parties aggrieved, in any case of trial or judgment before a justice of the peace, either by jury or otherwise, may take the same to the District Court of the proper county, by writ of *certiorari*, to be issued from said Court, by the clerk thereof, upon the applicant giving bond, with sureties approved by said clerk, within thirty days after such trial or judgment, conditioned," &c.

*230 *The thirty days refer not only to the filing of the bond, but the issuing of the writ. The grammatical construction of the sentence leads to this conclusion; which is strengthened, if we endeavor to ascertain the intention of the legislature, by looking at the consequences of putting any other construction upon the section. If we say that the time mentioned in the section refers only to the time of filing the bond, and that the writ may be issued afterwards, then the cause might be removed at any future time, and thus be suspended *ad infinitum*.

Judgment below affirmed.

Nathan Jackson, plaintiff in error, *v.* Calvin Fletcher and Ovid Butler, defendants in error.

Error to Johnson.

A clerical mistake in issuing the writ in *assumpsit*, where the precipe and the declaration shows the action to be in *debt*, may be corrected by amending the writ to correspond with the precipe and declaration. And a writ of attachment, and the affidavit on which it is issued (as auxiliary process in the cause), may also be amended (*v*).

(*v*) As to the amendment of affidavits generally, see Rev. § 4115. In attachment cases, see Wadsworth & Wells *v.* Cheeny & Stinson, 13 Iowa, 576; same case, 10 Iowa, 257; Langworthy & Bro. *v.* Waters, Hughes & Co. 11 Iowa, 432.

Nathan Jackson *v.* Calvin Fletcher and Ovid Butler.

Pleas in bar should not look beyond the judgment on which the action is brought.

This was an action of debt, brought by the defendants against the plaintiff in error, in the District Court of Johnson county, upon a judgment rendered in the Circuit Court of Tippecanoe county, Indiana.

The precipe directing the issuance of the summons and attachment, designated the action to be *debt* — but the clerk, through inadvertence, issued a summons in *assumpsit*. The declaration was also regularly in debt, and contained but one count setting out the judgment, and appending the record.

The defendant moved to dismiss the writ of attachment, —

1. Because no affidavit was filed in the clerk's office by plaintiffs previous to issuing the writ, as required by statute.

2. That the supposed affidavit filed was not legally sufficient.

3. Because no declaration was filed within ten days after issuing the writ, and before the return day thereof.

4. Because no declaration was filed as the law required.

*And the defendant also moved the Court to enter *231 a judgment of non-suit, —

1. Because no declaration was filed within ten days, &c.

2. Because said plaintiffs had not declared, as by law they were bound to do.

Thereupon the plaintiffs moved to amend the writ, which was allowed by the Court, and the writ amended, to which the defendant excepted.

The defendant then filed, —

1. A plea of *nul tiel* record.

2. That said judgment was obtained upon certain notes executed by the defendant to J. &. W. H. Davis, and endorsed to said plaintiffs as collateral security for the payment of a certain judgment against J. & W. H. Davis, and

in favor of Cunningham H. Ramsey, in the Circuit Court of Tippecanoe county, and that said judgment of M'Clelland and York against said J. & W. H. Davis, for which said note was given as collateral security, had been paid, &c.

3. That said judgment had been obtained against defendant by plaintiffs, on a note delivered to them by James Davis and William H. Davis, as collateral security, &c., &c.

To the first plea the plaintiffs replied; and to the second and third pleas, there was a demurrer for the following causes specially shown:—

1. The said pleas are contradictory.
2. They are uncertain and vague.
3. They are without legal form.
4. They are argumentative.

The Court sustained the demurrer. And the cause being submitted to the Court, judgment was awarded in favor of the plaintiffs against the defendant, for the sum of three hundred and ten dollars and ninety-eight cents, together with costs.

The defendant, Nathan Jackson, sued out his writ of error from this Court and has assigned for error:—

1. The Court ought to have dismissed the said attachment.

2. The Court ought to have sustained the defendant's motion to dismiss the attachment, and also his motion to non-suit the said plaintiffs for the want of a declaration, within ten days from the issuing of said writ.

3. The Court erred in allowing said plaintiffs to make a new writ to suit their cause of action.

4. Said Court ought not to have allowed said plaintiffs to make said amendment to said writ.

5. Said Court ought not to have allowed said plaintiffs to make said amendment to said affidavit.

*232 *6. Said plaintiffs had no legal right to make a new affidavit, or to make said amendment to said affidavit.

7. The Court ought not to have sustained said demurrers to said pleas.

8. That said judgment was given in favor of said plaintiffs, when by law it should have been for said defendant.

BATES & HARRISON, for plaintiff in error.

LOWE, BUTLER and CARLETON, for defendants in error.

PER CURIAM, MASON, CHIEF JUSTICE.— The first question I shall consider in this case is, whether the Court erred in allowing the amendment in the writ. The second section of our statute, concerning amendments and jeofails, vests the District Courts with power while the proceedings are before them, to examine writs, &c., and to amend "*all that which to them, in their discretion seemeth to be misprision of the clerks therein, so that by such misprision of the clerks no judgment shall be reversed or annulled.*" The District Court certainly had sufficient grounds to conclude that the amendment allowed was the correction of a clerical error, even although less latitude had been given to its discretion. The precipe and declaration being in debt, clearly shows that the summons being in assumpsit was wholly an error of the clerk. The attorney for the plaintiffs below filed their declaration in debt, and gave directions to the clerk to issue a summons, also in debt. The clerk committed an error which the Court was right in allowing to be amended. The English Courts, under a similar statute, allow the writ to be amended by instructions to the clerk. 1 Tidd, 661.

The writ being amendable, the defendant had no right to regard the case as being without a declaration, and therefore the motions based upon that position were correctly overruled.

The original affidavit was clearly insufficient, but the statute as clearly authorized the amendment allowed by the Court. The amendment must be considered as made

within a reasonable time, when made as soon as the Court has decided it to be necessary. Nor can the amendment of the affidavit authorized by the statute be limited to mere matters of form. The language of the law is general and no great evils seem likely to result from the natural and liberal construction of it. Where the grounds for issuing the attachment really exist, the object of the statute seems to be to prevent the quashing of the writ from any mistake or oversight in the original affidavit. Where such grounds do not exist, the affidavit cannot be amended.

*233 *The pleas which were demurred to are defective, not only in form, but in substance. They both look beyond the judgment on which this suit was brought; which judgment cannot be invalidated in this manner. The judgment was therefore right in sustaining the demurrer.

Judgment affirmed.

ABSALOM DOLLARHIDE, plaintiff in error *v.* THE UNITED STATES, defendant in error.

Error to Lousia.

If in an indictment it be charged that an assault was committed with an "*ax*" the inference is, that it was a "*deadly weapon*" (*w*).

The defendant was indicted in the Louisa District Court, at the November term, 1840, for committing an assault upon one Jasper Koons "with a certain ax which he, the said Absalom Dollarhide, then and there in his hands had and held, without any considerable provocation, to and at

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(*w*) Held sufficient to allege that the assault was committed with a "deadly weapon," in the language of the statute, without further description of the weapon. The State *v.* Seamons, 1 Gr. 418.

the said Jasper Koons, then and there willfully, maliciously, and unlawfully, did throw and hurl with intent to inflict upon him, the said Jasper Koons, a bodily injury, against the form of the statute," &c.

The defendant was tried at the June term, 1841, and a verdict of guilty rendered. The defendant, by S. Whicher, his attorney, moved in arrest of judgment.

1. Because the assault was not charged to have been made with a deadly weapon, or deadly instrument.

2. Because the language of the charge in said indictment is not the language of the statute, defining and punishing the offence, &c.

The motion was overruled and the defendant sentenced to one hour's imprisonment, and to pay a fine of fifty dollars and costs.

WHICHER, for plaintiff in error.

1. There are certain terms usually inserted in an indictment which mark out the offence, that are absolutely necessary to determine the judgment.

*2. The non-insertion of such terms will vitiate the *234 indictment.

3. All indictments upon penal statutes must state all the circumstances which make up the offense under the act.

4. No words, except those of the statute, however importing the statutable offense, will be sufficient to sustain an indictment.

5. It is in general necessary for an indictment to set out a statutable offense in the precise language of the act.

Authorities cited: 1 Chit. Crim. Law 242; 1 East. P. C. 115; Bac. Ab. Indictment, C. 1, p. 311; 1 Ch. C. L. 280; Fost. C. L. 305; 1 Ch. C. L. 282; 1 Hale 525; 1 East. C. L. 419, &c.

PER CURIAM, MASON, CHIEF JUSTICE.—The plaintiff in error, was indicted in the Court below under the statute

for punishing an assault with a deadly instrument with the intent to inflict a bodily injury. The indictment charged him with assaulting one Jasper Koons, with an axe; and that he threw and hurled the said axe at the said Koons with intent to inflict a bodily injury, &., following the language of the statute sufficiently in every particular, except the omission to aver that the axe was a deadly instrument. The defendant was found guilty, and a motion was made in arrest of judgment in consequence of this omission. This was overruled, for which reason the cause was brought here on writ of error.

In order to render the defendant punishable under the statute, the assault must certainly have been made with a *deadly weapon.* As a general rule, that fact should be distinctly averred. Such, at all events, is the safer and better course. But there are some weapons and instruments which we think the Court, from its knowledge of the English language, may judicially know to be of a deadly character without a distinct averment to that effect. If the allegation had been that the assault had been made with a drawn sword, or with a gun loaded with powder and ball, would it be necessary to aver that these were deadly weapons? We think not.

An axe when hurled by one man at another is scarcely less a deadly weapon than a drawn sword or loaded gun, and the Court is equally qualified to judge of its character in this respect. It is true that either of these instruments might have been so constructed as to shape, size, and material, is not to be a deadly weapon, but the language of an indictment ought not to be tortured into an unnatural meaning even in favor of the accused. Nothing, it is true,

should be left to inference, but words should receive
*235 their ordinary interpretation; and where a *distinct

and unequivocal meaning is thus conveyed, further precision is not necessary. Such we think is the case in the present instance.

This perhaps may be though a deviation from the ordinary current of judicial argument, but if it be so we think it a deviation on the side of reason. Courts should accommodate their decisions, as far as is compatible with justice to the common sense of mankind, if they would secure for the law its ablest guardian — public respect. There is some reason to apprehend that criminal justice has been already in some instances so disguised by technical refinements and subtleties, as to become a subject of ridicule to men whose minds are unbiased by their peculiar education or interests. This feeling ought not to be increased by increasing the cause; but on the contrary, where the current of authority is not too strong, we should seize all occasions to bring back the rules of decision to such a standard as the common reason of mankind may sanction and approve.

In the present case, the plaintiff in error is charged with hurling an axe at one Jasper Koons, with the intent to inflict upon him a bodily injury. Every person — the Court, the jury, and the prisoner is sufficiently informed of the nature of the offense charged. There is no danger of surprise or misapprehension. Nothing further seems to us necessary.

The judgment below is, therefore, affirmed.

ALEXANDER LEVI, appellant, *v.* JOHN THOMPSON AND OTHERS, appellees.

Appeal from Dubuque.

The statute which subjects to execution lands sold by the government, but not patented, is not contrary to the Organic Law.

As soon as any interest in lands passed from the United States to the purchaser, that interest becomes subject to local legislation, and like all other private property, may be rendered liable to sale and execution.

Alexander Levi *v.* John Thompson and others.

This was a bill in chancery, filed by Alexander Levi, complainant, against John Thompson, James M. Emerson, Hanibal Emerson, and John G. Shields, defendants, *236 in the District Court of Dubuque county. *The complainant states that in 1837, he and the said John Thompson received a certificate of pre-emption to a town lot in Dubuque; that in 1840, he entered, in the name of himself and Thompson, said lot, and paid out of his own funds six dollars and eighty cents, and obtained the certificate of the receiver of the land office. That said Thompson, the joint owner of the said lot, did, on the 8th November, 1841, sell and convey some interest in the same to the other defendants, &c. Complainant prays a partition of the premises, and that the defendants may account for the rents, &c.

To this bill the defendant, Thompson, pleaded that the lot in question had been sold under an execution by virtue of a judgment in favor of Clifton & Campbell, against said Thompson & Levi, and that he, Thompson, had become the purchaser and received the sheriff's deed. The other defendants answer that they were purchasers from Thompson, for a valuable consideration, without any suspicion that there was any outstanding interest.

The cause was heard at the May term, 1843, before the Hon. Judge Wilson, and the Court being sufficiently advised respecting the matters contained in the petition the plea and answer filed, adjudged the matters contained in the plea and answer to be a sufficient bar to the relief sought, and ordered that the bill be dismissed at the cost of the complainant.

The complainant appealed to this Court.

Jno. V. Berry, for complainant.

Davis & Crawford, for defendants.

Per Curiam, Mason, Chief Justice.—This is solely a question of legislative power. Lands sold by the govern-

ment, but not patented, are, by our statute, subject to execution. For the complainant in this case it is contended that laws granting such authority come in collision with the prohibition in the Organic Act, that "No law shall be passed interfering with the primary disposal of the soil." Is any such interference made by the law referred to?

The power of transferring to individuals any interest in the public lands is vested exclusively in congress; but after such interest has been created, it becomes subject to the control of local legislation, and like other private property, it may be rendered liable to sale on execution. This proposition is sufficiently broad to embrace all equitable interests. We think it clearly includes the interests which the purchaser of *government lands holds previous *237 to issuing of the patent. The property sold would be merely the interest held by the defendant in execution, subject to all the rights of the government.

If Levi, therefore, acquired any interest in the premises in controversy, by virtue of the purchase from the government and the payment of the money, that interest was legitimately sold in pursuance of our statute. If he acquired none, what right has he to come into Court and ask the relief there sought in relation to those very premises? So far as we are informed by the pleadings in the case, no patent has yet been issued; no new or further title has been created.

The effect of our statute is not the creation of a title in opposition to the government, but the disposition of any interest previously acquired by individuals. The law is, therefore, in strict compatibility with the rule laid down in the case of Bagnell *et al. v.* Broderick, 13 Peters, 436. Nor does it conflict with the decision in the case of Wilcox *v.* Jackson, 13 Peters, 498. The power of the legislature to declare the receiver's receipt of equal validity with a patent, is not alluded to in this act. In the case last quoted, the suit was virtually brought to eject the United

States from their own lands. The holder of the inchoate title was endeavoring to dispossess the holder of the perfect title. Doubtless, local legislation is limited in a case of that description. A law of that nature, to have such an effect, would be palpably interfering with the primary disposal of the soil. Congress can alone decide what shall constitute a transfer of the perfect title from the United States. Our legislature has control of any interest, legal or equitable, as soon as it becomes vested in the citizen.

We shall not enquire whether the sheriff's deed is in due form or was executed at the proper time. Those questions, at all events, cannot be raised by the present complainant in this matter.

Judgment below affirmed.

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*238 *HENRY DAVIDSON, plaintiff in error, *v.* OTIS M. WHEELER, defendant in error.

Error to Muscatine.

Where an action of replevin was commenced in Dubuque, and by consent of parties the venue was changed to Muscatine — held not to be erroneous (*x*).

The venue may be changed by consent of the parties in all cases where the Court has jurisdiction over the subject matter.

A statute which changes the practice operates upon pending causes, and the proceedings thereafter should be conducted in accordance with such change.

This was an action of replevin brought by Henry Davidson against Otis M. Wheeler, in the District Court of Dubuque, for two boxes of dry goods and two boxes of

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(*x*) But where the Court has not jurisdiction over the subject matter of the controversy, consent will not confer it. Smith *v.* Dubuque county, 1 Iowa, 492; Dicks *v.* Hatch, 10 Iowa, 380.

boots and shoes. At the September term, 1839, by consent of the parties, the venue was changed to Muscatine county, Judge Wilson, then presiding, having been counsel for the plaintiff.

At the June term of the District Court of Muscatine, 1841, the cause was tried before the Hon. Joseph Williams, and a jury. The jury found the property to be in Hungerford & Livingston's store, and that the value of the same was $1,071.41, and that the defendant had sustained damages to the amount of $589. And thereupon the defendant remitted of the damages the sum of $53.30. Judgment that the defendant have and recover to the use of Hungerford & Livingston, the said sum of $1,071.41, the value of the goods so as aforesaid found by the jury, together with the sum of $535.70 so as aforesaid by the jury assessed (deducting the amount remitted), together with interest on the amount of the value of the goods, at the rate of six per cent from the 20th of November, 1837, the day on which the goods were replevied, $230.33, amounting in the whole to the sum of $1,837.44, together with his costs, $33.44.

On this judgment the plaintiff sued out his writ of error.

Assignment of errors: —

1. The Court erred in directing a change of venue from Dubuque county to Muscatine, without the usual showing required by the statute.

2. The District Court of Muscatine county erred in entertaining jurisdiction of the said cause.

*3. Pleas do not traverse or deny the right of *239 plaintiff, which is the material issue.

4. They go to the value instead of a return of the property.

5. They conclude to the Court instead of the country.

6. The Court erred in taking a rule on the plaintiff's reply to defendant's pleas.

7. The Court erred in swearing the jury to assess damages.

8. The Court erred in rendering a larger judgment than the jury found.

9. The Court erred in rendering a general judgment for the use of Hungerford & Livingston.

10. The jury assessed more than fifty per cent damages.

DAVIS, CRAWFORD & LOWE, for plaintiff.

WHICHER, BRADFORD & PARKER, for defendant.

PER CURIAM, MASON, CHIEF JUSTICE. — We shall first notice the point made by the plaintiff in error that the District Court of Muscatine county had no jurisdiction of the cause. The action was commenced in Dubuque, and by consent of parties the venue was changed to Muscatine. It is contended that the only mode of legally changing the venue in any case is to pursue the mode pointed out by the statute, and that "consent cannot give jurisdiction."

This last is a correct maxim of law, but its application has been mistaken in the present case. It applies to a case where the Court has no jurisdiction over the subject matter, as if a justice of the peace were to try a man for murder. There the consent of the accused could never render the sentence legal. But, in the present case, the Court had full jurisdiction, provided the parties were properly before it.

Suppose, in a suit brought in the proper county, the defendant makes a voluntary appearance without being summoned according to law. As well might it be said that consent could not give jurisdiction in that case as in this. This maxim of law that consent takes away all error is directly applicable to both cases, for the only question in either is whether the parties are regularly in Court; not whether the Court has jurisdiction of the case.

But a graver matter remains to be considered. It is alleged that the proceedings on the trial were not in accordance with the requisitions of the statute.

It was an action of replevin brought prior, but tried subsequent, to the *passage of our present replevin *240 law. The proceedings on the trial should, therefore, have been in accordance with the new law, for it is a well settled rule that, where the practice is changed during the pendency of a suit, all subsequent proceedings must, as far as practicable, conform to the new law.

The plaintiff failed to prosecute his suit, and thereupon a jury was empanneled and sworn "to enquire and assess the value of the goods and chattels so as aforesaid replevied, and to assess the damages sustained by the defendant in the premises." Now, the laws of the first session of the Iowa legislature, page 400, provide that, in a case of this kind, a jury shall be empanneled "to enquire into the right of property and right of possession of the defendant to the goods and chattels in controversy."

But not only was the oath incorrectly administered, but the finding of the jury was equally erroneous. Instead of bringing in a verdict in accordance with the statute, they found the property to belong to Hungerford & Livingston, strangers to the record. They also awarded damages to the defendant to the amount of more than five hundred dollars, whereas the statute only authorized the jury to find damages for the defendant when they found that the property was his, or that he was entitled to the possession thereof.

These are great and substantial departures from the mode prescribed by the statute, and render the proceedings materially erroneous.

The judgment below will, therefore, be set aside, and a new trial ordered.

ROBERT STUART, plaintiff in error, *v.* WILLIAM R. KERR, defendant in error.

Error to Muscatine.

The action of account is obsolete, and cannot legally be brought in Iowa (*y*).

This was an action of account, brought by Kerr against Stuart, in the District Court of Muscatine. At the December term, 1841, judgment was rendered on the report of the auditor for the plaintiff, in the sum of $312.12.

*241 *LOWE & HASTINGS, for plaintiff in error.

WHICHER, for defendant in error.

PER CURIAM, MASON, CHIEF JUSTICE. — The main question in this case is, whether the action of account can be legally brought in this territory? Our statutes do not authorize it; and if recognized and sustained, it must be as a feature of the common law. At common law it was allowed, but has now almost, if not entirely, become obsolete even in England, where it has scarcely been resorted to for the last century and a half. We believe it is recognized in none of the States which have a Chancery Court, unless authorized or regulated by statute. Many of the proceedings under this form of action are extremely inconvenient and wholly unadapted to our condition and mode of practice. We think it a useless form of action, into which it is wholly unnecessary for us to undertake the difficult, if not impracticable task of infusing life and vigor. The judgment below will, therefore, be reversed.

(*y*) All the old forms of actions are abolished by the Revision, § 2608.

Jacob Dice *v.* Job Yarnel.

JACOB DICE, plaintiff in error, *v.* JOB YARNEL, defendant in error.

Error to Van Buren.

In an action of assumpsit upon promises made subsequent to and in conformity to an award, parol testimony to prove that other matters than those contained in the written submission were submitted to the arbitrators, is admissible.

This was an action of assumpsit brought by Yarnel *v.* Dice, in the District Court of Van Buren county.

The declaration states that Yarnel and Dice had jointly purchased of one Weston, a certain claim in said county; that difficulties had arisen between them in relation to the occupancy of the land, and that the matters were submitted to arbitration. That the arbitrators awarded that the said Yarnel should have the north half, and that Dice should have the south half of the quarter section. That Dice should make his equal share of improvements on the north half, in breaking and *fencing, so as to *242 make the improvements equal to those in the south half, at the time the parties purchased the claim (building excepted).

That Yarnel delivered up to Dice the occupancy of the south half on his promise to make the stipulated improvement upon the north half of the claim. That he had failed to perform, &c.

Plea, non assumpsit.

The case was submitted to a jury at the April term, 1842, and a verdict and judgment given for the plaintiff, for the sum of $70 and costs.

The bill of exceptions taken in this cause specifies that on the trial the plaintiff introduced submission in writing between the parties (as set forth in the record), and offered parol evidence to prove that other matters than those con-

tained in the written submission were submitted to the arbitrators; to which parol testimony the defendant objected, but the objection was overruled by the Court, and parol testimony admitted to prove that other matters than those contained in the written submission were acted upon by the arbitrators.

The defendant below sued out his writ of error from this Court on the fiat of the Chief Justice for probable cause of error.

J. C. HALL for plaintiff in error.

The only question presented in this case is, can testimony be given in evidence to sustain an award, showing that other matters than those set out in the written submission were acted upon by the arbitrators on a written submission to take up other differences and award upon them?

It is decided parol testimony was inadmissable to show a palpable mistake or miscalculation of arbitrators. 2 John. 63.

Parol testimony not admissable to extend or limit the submission. 9 John. R. 42.

An award not within the submission is void. Cited 2 Petersdorff, 157.

These cases establish the principle that an award that does not follow the submission is void and cannot be corrected by parol testimony; on the principle that their jurisdiction arises from the submission. Then if the submission is in writing, can the award be sustained by parol testimony, changing the submission and enlarging the jurisdiction of the arbitrators?

There is no principle better established than that an agreement cannot rest partly in writing and part in parol.

Even in chancery that principle is fully repudiated.

*243 *LEWIS & STARR for defendant in error.

A difference of opinion existed as to whether the

submission did or did not embrace the whole of the difficulties existing between the parties; but the declaration, particularly the third and last count, sets forth that the arbitrators having brought in an award, the parties mutually agreed to submit to it, and that in accordance with it, Job Yarnel delivered up the part of the land required, and performed all things called for on his part by the award, and that Dice, in consideration thereof, promised to perform what was called for in the award.

The first two counts in the declaration set forth a submission, but do not say that it was in writing, and the fact was that all their difficulties which were proven to their neighbors were submitted, but the person who drew up the writing intended to cover the whole case, did not embrace in the article specifically, anything more than the divisions of the land; whereas they did actually agree that they should award as they did upon the whole case. We therefore brought assumpsit, and show a parol submission, and not only so allege, at least in the third count, that they acquiesced in it, and agreed to abide by it, and that Yarnel's having given up a part of his land, &c., afforded a consideration for Dice's promise. Now how could we sue Dice on that promise, without showing that he promised (as we allege) to do all things which the arbitrators decided he should do, and without showing what they did decide upon?

We did not bring debt on the bond of submission, but we brought assumpsit on the promise, and if there was anything wrong it was our introducing the written submission. They should have objected to the introduction of that as being under seal, but they could not throw us out of Court on the ground of our having offered in evidence an instrument not properly admissible. We claim on the ground of a parol submission strengthened by the parties, acquiescence therein, and the plaintiff having given up his

property under the expectation of receiving the work which Dice promised to do.

That a parol submission is good is not controverted. See 15 Wendel, 99; 12 Wend. 578. Even if it were not, the subsequent affirmation of it by the parties would make it good, and therefore it would be necessary to render to all the matters that were submitted.

By the Court, Mason, Chief Justice, and Justice Williams.—The only error assigned in this case is that the Court admitted parol evidence to prove that other *244 matters were submitted to the arbitrators *than those contained in the written submission. Had the action been brought for a breach of the agreement contained in the written submission, parol testimony to vary the terms of that submission would have been clearly inadmissible. Or had the suit been brought to recover money due and ascertained through the award of arbitrators for which an *indebitatus assumpsit* would have lain, the written submission must alone have been the basis of that award. But the declaration in the present case, after citing the submission and award (without stating whether the former was parol or written), alleges that the plaintiff performed what the said award had rendered it incumbent on him to perform, and that in consideration thereof the defendant undertook and promised to do certain things which the arbitrators had decided that he ought to do and perform. A breach of the agreement is then sufficiently set forth.

The gist of the action then seems to be neither the submission nor the award, but the subsequent promise, for which there was an adequate consideration. If this be the case, the only object in setting forth and proving the submission and award was to show the exact nature of the promise, and in some degree to strengthen the consideration therefor. The submission does not seem to be strictly material, but a part having been proved it was proper that

the whole should appear before the jury. All that was necessary to enable the plaintiff to recover was proof of the final promise, the consideration and the breach; but the previous submission (as well parol as written) might tend to reflect light upon the subsequent promise sufficient to justify its introduction, on the ground of relevancy. At all events, from the facts appearing before us, we are not prepared to decide that the Court erred in admitting the parol testimony referred to on that score; which is the only available objection, if any, that could have been raised to it.

Judgment affirmed.

WILSON, JUSTICE.— I think that the error of the arbitrators, in going beyond the written submission of the parties, was waived by the plainiff in error, when he agreed with the defendant in error to abide by and perform the award, and reaped the benefit arising from the latter's performance of those things to be done on his part, and that he cannot now set it up as a defense. It appears to me, however, that it was unnecessary, on the part of Yarnel, on the trial in the Court below, to adduce testimony showing that these matters, not mentioned in the parol submission, were submitted to the arbitrators. It was sufficient for him to *show that an award was made, that both parties *245 agreed to abide by and perform it, and that he performed his part which was accepted by Dice. When parol testimony was introduced, on the part of Yarnel, showing that the parties went beyond the written submission, there was a violation of the well settled principle of law, that parol testimony cannot be received to extend the terms of a written agreement. and as it may have had some influence upon the jury in estimating the damages, the judgment, in my opinion, ought to be reversed.

George W. Fitch, appellant, *v.* Rufus Richardson, appellee.

Appeal from Muscatine.

It is not proper to quash a *ne exeat*, to dissolve the injunction, and to dismiss the bill upon the bill and answer, &c., where the equitable matter is not ripe for the action of the Court.

The filing of an answer is the basis for a motion to set aside a writ of *ne exeat*, and no affidavit is necessary to predicate a motion for that purpose.

The District Courts make their own rules as to the form of motions.

Whicher, for complainant.

This was a bill in chancery, having for its object the prohibition of the defendant from removing certain personal property, mentioned therein, from the county of Muscatine, where it is charged that the contract not to remove was made, which property, it is alleged, was mortgaged to plaintiff to secure the payment of a note of two hundred dollars, due in January, 1843. It also prays the writ of *ne exeat republica* against the person of the defendant. Both writs were ordered in vacation, under the "act regulating the issuing of writs of *ne exeat* and injunctions," approved January 25, 1839. See laws of Iowa, page 350.

The answer admits the contract by which the defendant mortgaged the property and covenanted not to remove, as charged in the bill; but denies his intention to remove. The case was heard in the Court below on bill and answer. The decree was that the writ of *ne exeat* be quashed, the injunction dissolved and the bill dismissed. From this decree the plaintiff appeals to this Court, and makes the following points:—

*246 *1. The cause was prematurely heard in the Court below.

2. There was no affidavit of defendant on which he could at any time predicte a motion to quash.

3. There was no motion in writing, filed nor served on plaintiff's attorney, to quash the writ or dissolve the injunction.

First. The note for the security, of which the mortgage was given, was not due until the 15th January, 1843. The final decree from which this appeal is taken, was rendered in the Court below, at the June term, 1842. The statute, Iowa laws, p. 352–57, provides that the Court, in cases of this kind, shall hear and determine as in other suits in chancery, "if the matters alleged in the bill be purely of an equitable character, and the *time for the performance of the duty or obligation of the defendant has expired; if not, then the proceedings shall be stayed until it has expired.*" The statute reserves the right to the defendant to move to quash the writ at any time. The Court, then, before the time for the performance of the duty, could hear nothing in relation to the case, but a motion to quash. But no such motion was made. The record says the *cause coming on to be heard on bill and answer, &c.* This much only need be said on this point; and here the argument might close on the part of the plaintiff; but, —

Secondly. It is insisted by the defendant that a decree of dissolution and a dismissal followed as a necessary consequence of an order to quash. These by no means follow. But no such motion was made. No affidavit on which to predicate such motion was filed. The common oath appended to answers is not such oath as is contemplated by law. There must be an affidavit aside from the answer. See 1 Ves. 91; 8 Ves. 597.

"The Court acts on evidence of intention to go abroad without regard to denial." 1 Smith's Chancery Practice, 581.

The rule that motions must be in writing, has been in force ever since Courts of justice were established on the west side of the Mississippi. All motions not of course, are and ought to be part of the record. Judge Irvin's rule

14 was, that all motions of course shall be in writing, filed with the clerk. The second rule of practice in force since the organization of Iowa territory is, "that all motions shall be in writing signed by counsel and filed by the clerk among the papers in the cause to which they relate." If there were any dispensation of a motion in writing, it should be noticed in the record. In the absence of such motion in the record, the Court will not presume there was a motion either to quash the writ or dissolve the injunction.

*247 *That the bill contains sufficient matter for both a writ of *ne exeat* and injunction. *Vide* laws of Iowa, p. 350, 1, 2; 2, Paige R. 606; 2 Wash. C. C. R. 130.

The defendant must be as positive as is required to hold to bail. 11 Ves. 54. Application for writ may be founded on defendant's answer, that supplying the place of an affidavit by plaintiff, 6 Ves. 95. "A general affidavit of belief of defendant's intention to quit the kingdom is sufficient, without the circumstances upon which that belief is founded; but it is better to set forth the ground of belief." 1 Smith's Chancery Prac. 581; 5 Ves. 96.

Nor will a writ of *ne exeat* granted upon a declaration of facts as evidence of the intention to go abroad, be discharged upon the affidavit denying such intention. 1 Smith's Ch. Prac. 581; 8 Ves. 594.

Per Curiam, Mason, Chief Justice.—(Judge Williams was not on the bench when this case was argued and heard).

The first objection raised here to the proceedings below is, that the cause was prematurely heard on bill and answer. This objection is confined to the proceedings in relation to the writ of *ne exeat;* for in relation to the injunction, the statute in confirmation of the previous law expressly gives the right to move for a dissolution upon the filing of an answer. Laws of 1838–9, p. 353. The seventh section of the act in relation to *ne exeats* and injunc-

tions, provides that "on the return of the writ of *ne exeat*, if the same shall have been duly served, the Court shall proceed therein as in other cases in chancery, if the matters alleged in said bill be purely of an equitable character, and the time of performance of the duty or obligation of the defendant has expired; if not, then the proceedings shall be stayed until it has expired. *But the Court may, nevertheless, proceed to determine whether the said writ ought not to be quashed or set aside.*"

Had the proceedings in this case been *upon the merits* prior to the time for the performance of the duty or obligation, and had the objection been raised by the defendant, it would certainly have been available. On the return of a writ of *ne exeat*, if the matters charged in the bill are of an equitable character, the Court is authorized to try and determine the whole matter in controversy without the intervention of a separate proceeding for that purpose. But as it would be unjust to the defendant to compel him to incur the trouble and expense of defending himself against a suit in chancery before the time when his liability arises in pursuance of his agreement, the statute declares that the proceedings *shall be stayed until the proper *248 time shall arrive. This is an arrangement peculiarly for the defendant's benefit; for at the same time he may proceed to have the writ quashed or set aside, if the circumstances of the case will authorize such proceeding.

In the present case the record states that the cause came on to be heard upon the bill, answer, replication, and exhibits, but still the merits of the case were not tried. No valid objection can, therefore, be urged that the cause was prematurely heard. The injunction was dissolved as is usual, where the answer denies the equity of the bill, and no steps are taken pursuant to the statute to rebut the allegations of the answer.

But the writ of *ne exeat* was quashed by the Court. Perhaps it would have been more technically correct to have

ly run from one county to another in this territory; therefore, in this there is manifest error.

2. In the rendition of the judgment aforesaid, it is made to appear that this judgment is by confession, when in truth it is a judgment by default; therefore, in this there is manifest error in the record.

WHICHER, for plaintiff in error: —

The error relied on to reverse the judgment below is that the *capias ad respondendum*, by which writ this *250 suit was commenced, was directed *to the county of Cedar, as set forth in the bill of exceptions. Can a writ run to any part of the territory? The plaintiff infers that it cannot.

1. From the course of legislation on this subject, congress has enacted that the legislative power of Iowa shall extend to all rightful subjects of legislation. Organic Act, § 6. The legislature of Iowa has enacted (Laws of Iowa, 1839, p. 53, §§ 2 and 3) that an attachment may issue in actions *ex delicto* in cases where bail has been ordered and a *capias* issued thereon, &c. After some other provisions the statute directs, in reference to cases *ex delicto*, that "In other respects the proceedings shall be the same as in actions founded on contract." In actions personal the statute provides, p. 379, that "When there is more than one defendant, the plaintiff commencing his action where either of them reside may have a writ or writs issued directed to any county or counties where the other defendants or either of them may be found." These provisions, it will not be denied, are rightful subjects of legislation. They are not vain and nugatory acts, but are what are called *enabling statutes*, authorizing writs in certain cases to go out of the county. A fair construction of legislative will would seem to forbid a writ to go out of the county without express legislative authority. Nor are these the only enactments authorizing writs to go

out of the county. Subpœnas may issue in certain cases, provided the distance is not more than fifty miles. Writs of execution may, upon request, be directed to the proper officer of any county within this territory. *Ib.* p. 200. In actions of right, a writ of summons may issue on certain contingencies to any county in the territory. *Ib.* p. 420; *vide*, also, p. 63, §§ 31 and 32.

There may be many other provisions in our statutes authorizing writs to issue from one county to another; but, in the absence of any enactment, the power of the Court does not exist.

2. Nothing in favor of this power can be inferred from the Common Law of England, but rather against it. There, all writs are supposed to issue from the Lord Chancellor, and run to every county in the kingdom. Here, they are issued by the Court — not the Court of the territory, nor the Court of the district, but by "The District Court of Iowa territory, within and for the county of Linn." Every county has a distinct Court (read Organic Act, p. 35), and its jurisdiction in regard to territorial extent is limited by the boundaries of the county, unless otherwise prescribed by statute.

It may be urged that the judgment is by confession. Plaintiff does not so understand it. There is no confession; the clerk may have *crowded the word *con-* *251 *fessed* into the judgment, but there is nothing in the proceedings on which he could predicate it. It is true, the plea was withdrawn, but judgment should have been by default. An attorney could not confess a judgment for his client in any case without a warrant of attorney. In actions for tort, every consideration of law and policy would seem to forbid it, even if it were allowable in actions *ex contractu.* But the record shows affirmatively that, by the proceedings had in the Court at the time judgment was rendered, the plaintiff here waived no error. If defendant here did not like the terms upon which the case

was concluded in the Court below, he ought to have gone to trial, and not accepted the judgment on the terms apparent of record.

Lowe, for the defendant in error.

Per Curiam, Mason, Chief Justice. — This was an action of trespass *quare clausum fregit.* The injury is charged to have been committed in the county of Linn. The suit was commenced in that county, but the *capias* was directed to the sheriff of Cedar county, and by him returned, served. This is the only error assigned in the case.

The action is local, and must, therefore, have been brought in Linn county. Unless the process of the Court of that county will, in such case, run into the adjoining counties, the plaintiff below was remediless, no matter how great the outrage, provided the defendant avoided being caught in Linn county. The Court would be bound to go as far as any argument *ab inconvenienti* could legitimately force it in sustaining the legality of the present procedure, for without this power many of the most atrocious injuries will be irreparable. The perpetrator has only to avoid being arrested in the county where the outrage was committed until he is protected by the statute of limitations, and he may commit trespasses of this nature with impunity. What makes the matter still worse is, that while the injured party is thus prevented from seeking his remedy, the statute of limitations does not cease to run against him, unless the aggressor shall be out of this territory. See Laws of 1838–9, page 327. A strong appeal is thus made, if not to the Courts, at least to the legislature, to provide a remedy for a class of wrongs which, in a country cut up into small counties like ours may be quite numerous.

But we shall waive this question at present, its decision not being necessary in the present case. Admitting

that the defendant below was wrongly arrested in the first instance, that error was, we think, cured *by *252 the arrangement finally entered into by the counsel for the respective parties. Had the suit been commenced by summons, his appearance alone would have been a waiver of all antecedent objections. Such, however, is not the case where the appearance is not voluntary. But here the defendant not only appeared by his counsel, but gave his consent, through the same medium, that a judgment for a specified amount should be rendered against him. This, we think, cured all defects and irregularities in the previous proceedings. It matters not whether this were a judgment by confession or not. It was, at least, a judgment by consent, and for a fixed amount. It is fair to presume that the doubt as to the regularity of the previous proceedings, operated upon the mind of the plaintiff below to induce him to accept of the amount agreed upon. The defendant stipulated for a six months stay of execution, of which he has already availed himself. It is an act of bad faith for him now to refuse to fulfill his agreement, to the perpetration of which the Court will not lend itself. The judgment below will, therefore, be affirmed.

WILSON, JUSTICE.—To me it seems clear that the writ of *capias ad respondendum* was improperly issued by the clerk of the District Court of Linn county to the sheriff of Cedar county; that it should have been quashed when the motion to that effect was made in the District Court. The principles of the Common Law cannot apply in this case, because the legislative assembly has taken up the subject of issuing writs, and said when, how, and by whom the process necessary for bringing defendants into Court shall be issued and served; and we cannot look beyond the statutes for authority for issuing and serving them in a different manner. The District Court in each county is limited in its jurisdiction to the particular county

in which the Court exists, unless that jurisdiction is extended by some special statute. There is no statute which authorized the District Court of Linn county to extend its jurisdiction into Cedar county in this case. The Supreme Court have made similar decisions in Scammon's Rep. p. 34 and 416. The hardship and inconvenience which might result from this decision are arguments to be addressed to the legislative assembly, and not to the Courts. I concur, however, in the opinion of the other members of the Court, that the plaintiff in error waived the objection to the jurisdiction of the Court, and that the agreement of the counsel gave the Court jurisdiction.

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*253 *PETER A. LORIMIER and ROBERT WALLER, administrators of Abraham Wilson, deceased, *v.* SAMUEL LEWIS *et al.*

Error to Dubuque.

In an action of forcible entry, it matters not that the plaintiffs themselves were trespassers. A trespasser may, under certain circumstances maintain this action against the legal owner (*a*).

The president of the United States has no power, by virtue of his office and independent of statutory authority, to lease the lead mines in Iowa.

There is no law in existence authorizing the president to lease the lead mines.

This was an action of forcible entry and detainer in the District Court of Dubuque county, on an appeal from a justice of the peace where verdict and judgment had been rendered for the plaintiffs.

The following agreement was made by the parties:—

(*a*) See Settle *v.* Henson, *ante*, 111; Langworthy *v.* Myers *et al.* 4 Iowa, 18.

"That the above case shall be submitted to the District Court aforesaid, at the present term, and the issues of law and fact submitted to the Court.

"It is admitted that the *locus in quo* is public land, belonging to the United States; that it has not been proclaimed for sale, or subject to private entry by any existing law of the United States. Upon the trial here, the plaintiffs admit that a lease of the lot in question was duly made and executed by John Flanagan, agent of the United States Lead Mines, to the defendants (a copy of which is made part of this case); that the defendants entered under and by virtue of said lease.

"The plaintiffs further admit and agree that the letters of appointment of the said Flanagan, as agent of the lead mines, together with any and all instructions which said Flanagan may have received in reference to leasing the lands within the mineral district, or upper Mississippi, or north-west lead mines, whether from the president of the United States, the treasury, war, or ordinance departments, may be received by the Court as genuine, and coming from the public officers from whom they purport to come. It is further agreed by the parties that if the Court shall be of opinion that the said John Flanagan had legal authority to grant said lease, then judgment is to be rendered for the defendants. But if the Court shall be of opinion that said John Flanagan had no legal *authority to grant *254 said lease, then the judgment rendered in the Court of the justice of the peace to be affirmed.

"This agreement shall also extend to the admission of testimony in the Supreme Court of Iowa. It is understood that this agreement is not to operate as a waiver to the right of appeal, or suing out a writ of error by either party.

"TIMOTHY DAVIS, *Attorney for plaintiffs.*

"BERRY & WILSON, *Attorneys for defendants.*"

The case was argued before the District Court, at February term, 1843, and the judge being of opinion that the

right to lease the lead mines, as claimed, did not exist, the judgment was for the plaintiffs.

PER CURIAM, MASON, CHIEF JUSTICE.— This was an action of forcible entry and detainer, commenced before a justice of the peace, and brought by appeal into the District Court of Dubuque county. The case was submitted to that Court on an agreed statement of facts, which, although affording but an imperfect view of the whole matter, must constitute the only ground for a decision here.

It is admitted that the *locus in quo* was public land belonging to the United States, and that the defendants entered under and by virtue of a lease from the agent of the United States lead mines; but the plaintiff's ground of action is not set forth, nor whether they or any one else were in possession of the lands at the time the aforesaid lease was executed. By mutual consent, the whole case is to turn upon one point: the power of the president of the United States to authorize the granting of leases of this nature for any or all lead mines on the west side of the Mississippi river.

It was contended, in the course of the argument, that the plaintiffs below in this case were themselves sheer trespassers, and much stress seemed to be laid on that circumstance. That fact, however, is in no manner mingled with this case. The action is not ejectment, but forcible entry and detainer, and may be brought by a trespasser, even against the legal owner of the premises. All that is necessary to sustain this action is, that the defendant should forcibly and illegally have turned the plaintiff out of possession.

Besides, the stipulations in the agreement make the whole to depend upon the right of the agent to lease, and we cannot travel beyond that agreement. Nothing is therein mentioned of the plaintiffs being trespassers. We have, therefore, no data by which to ascertain the

title of *the plaintiffs, nor if we had would that *255 be a proper subject of consideration in this form of action.

It has been urged that the president is vested with the power in question, in consequence of the general supervision of the public lands, with which he is by law entrusted. Such a power, however, should have a more substantial basis. It is not a branch of prerogative. It should not result from implication. The right to lease the lead mines would imply a like power in relation to all the other lands of the territory. If a lease for three years can be legally given, independent of statutory authority, why not for fifty? And if the president can grant such leases, congress itself can afterwards only dispose of the reversion. Whole states might thus have been peopled by a race of tenantry, holding, not under the government, but under the executive.

Probably, from such views of the case, serious doubts have sometimes been entertained whether even congress possesses the legitimate power to authorize such leases. The Supreme Court of the United States have recently set this question at rest. United States *v.* Gratiot, *et al.* 14 Peters, 526.

We feel no disposition to rebel against that decision. We think, however, that in such cases the constitutional power of congress is exerted to its utmost tension, and that under such circumstances no power of this nature can exist independent of an unequivocal statute. None should result from inference or be obtained by loose construction. If congress, either directly, or by a fair and reasonable construction of any statute, have authorized the leasing of the lead mines in the manner pursued by the agent at Dubuque, the decision of the District Court must be reversed; otherwise not.

What authority, then, has been conferred by statute, to justify such leasing? None has been pointed out, except that derived from two acts of congress, both passed March

3, 1807. One of these, entitled "An act making provision for the disposal of the public lands situated between the United States military tract and the Connecticut reserve, and for other purposes," authorizes the president to lease, for a term not exceeding five years, any lead mine which has been, or may hereafter be discovered *in the Indian territory*. This act, so far from giving the authority contended for, raises a strong inference against it, agreeably to the maxim "*inclusio unius est exclusio alterius.*"*

The express power given to lease in the *Indian ter-*
*256 *ritory* is local, and, *inferentially, witholds the like power to lease elsewhere. It also goes far to overthrow the position assumed in the argument, that the law having intrusted the president with a general supervision of the public domain, he possesses the power to lease the lead mines in the absence of any express statute on the subject. If the executive was already vested with a general power of this nature, why should it be again conferred upon him in a particular case? By the passage of the act referred to, we have at least a legislative exposition of the law on this subject, independent of statute.

But reliance is chiefly placed upon the other statute referred to, bearing even date with the above mentioned. It is entitled "An act to prevent settlements being made on lands ceded to the United States, until authorized by law." The first section of that act prescribes certain penalties and forfeitures, in case of unauthorized settlements upon the public lands. The president is also empowered to direct the marshal to remove intruders *and also to take such other measures, and to employ such military force as he may judge necessary and proper to effect such removal.* It is contended that inasmuch as the president is hereby authorized "to take such other measures" as he may judge necessary and proper to remove intruders, he may make a lease for

*One being included, supposes an exclusion of the other.

that purpose; that instead of ordering out the military force, he may lease the ground to some other citizen, and then leave the latter to remove the intruder by legal and peaceable means.

Such would be a most liberal construction of the staute, under any circumstances; but the reasoning would be much more plausible were it not for the absence of one essential fact. There is nothing to show that the lease in the present case, was given for any such purpose It does not appear from the agreed statement of facts that any person was upon the land when the lease was made to the defendants below. Admitting that the president would be authorized to employ this "measure" to remove a trespasser, could he anticipate the trespass and lease the lands to prevent intrusion? Under the general authority to select his own measures to remove intruders, can he dispose of the whole public domain for an unlimited space of time, before yet a single intruder has set foot upon it? The proposition carries its own refutation; and yet if the position taken by the counsel for the defendants be tenable, we shall be irresistably driven to this sweeping conclusion.

The only remaining argument that we recollect to have heard urged for the plaintiffs in error (though as we find no brief among the papers of the case, we may have forgotten some points) is derived from the *pow- *257
er to lease contained in the second section of the last mentioned statute. That section commences with a provision in favor of those who had settled on the public lands prior to that date, authorizing them to remain, upon making application to the proper land officer and complying with certain conditions therein prescribed, and concludes with the following proviso: "That in all cases where the tract of land applied for includes either a lead mine or salt spring, no permission to work the same shall be granted without the approbation of the president of the United States, *who is hereby authorized to cause such mines*

or springs to be leased for a term not exceeding three years, and on such conditions as he shall think proper." It is insisted on the one hand that this proviso contains a general authority to lease mines and salt springs. This cannot be the proper construction of the statute. The authority herein contained must be explained by the context, the proviso by the subject matter of the section. That section relates entirely to the case of persons who were then upon the public lands — allows them to remain upon complying with certain requisites, unless the tract embraces a lead mine or a salt spring, in which case the approbation of the president is made necessary. Then comes the clause under consideration, authorizing the president to lease "such mines and salt springs" for the term of three years. What mines and salt springs are here referred to? Clearly those located on tracts then occupied, and to the further occupancy of which the approbation of the president is made requisite.

This view of the matter is confirmed by the passage of the other statute already referred to. If the proviso we have been considering was intended to confer a general power of leasing all lead mines and salt springs, could there be any necessity for other statute, giving the special power to lease *in the Indian territory?* These two acts were passed not only by the same Congress, but on the same day, and there is therefore the strongest necessity for giving them such a construction as to give effect to both. This will be best accomplished by regarding the one as local and the other as applicable to all lands *then occupied.* The case at bar cannot be placed in a predicament to be affected by either of these statutes. We therefore conclude that there is no law to authorize the leasing of the lead mines within this territory.

Judgment below affirmed.

*THOMAS WRIGHT, plaintiff in error, *v.* ADAM ANTRIM, defendant in error. *258

Error to Henry.

The question of costs, upon granting a new trial, is left to the discretion of the District Court (*b*).

This was an action of assumpsit, brought by Wright against Antrim, in the District Court of Henry county.

The point saved for the consideration of the Supreme Court is contained in the statement of the counsel for the plaintiff in error.

Errors assigned: —

1. The Court erred in rendering up judgment for costs against Wright at the September term, 1842, which costs were made at the March term, 1842.

2. The Court erred in giving costs against the plaintiff.

J. C. HALL, for plaintiff in error.

At the March term of the Court, 1842, there was a trial in this case and a verdict for the defendant. Thereupon, on motion of the plaintiff, the verdict was set aside and a new trial granted. No order whatever was made as to costs, and no condition attached to the granting of the new trial. It appears to be unconditional. At the September term, 1842, the second trial was had, and verdict for the plaintiff. Whereupon the Court rendered a judgment against the plaintiff for the costs of the March term.

Costs follow a recovery as a right, not at the discretion of the Court. True, the Court may punish a party with costs if they do wrong, may relieve them upon conditions, but the Court cannot reinstate a party, and after a party has availed himself of the favor, fix the terms and price of

(*b*) See Revision, § 3451.

that favor. If the Court had granted the new trial, and made it upon condition of paying costs, it would have been right. Then the party could have relied upon his bill of exceptions, and appealed to the Supreme Court, or taken the new trial upon the terms offered. He was not bound to take the new trial if the terms did not suit him. Then with what kind of right can the Court, after he has *259 received it *without condition, decide upon the condition and fix the price of the favor.

Per Curiam, Mason Chief Justice. — The question of costs upon granting a new trial is left to the discretion of the District Court. We do not feel disposed to interfere with that discretion, even in the present instance, although the costs were awarded at a subsequent term, against the party obtaining a new trial. The circumstances might have been such as to justify the Court in such a case, and such will be presumed to have been the fact, under the present circumstances of this case.

Judgment affirmed.

Mordecai H. Cropper, plaintiff in error, *v.* The United States, defendant in error.

Error to Johnson.

The confession of a prisoner will be received if that confession is not extorted by a threat of a *criminal* prosecution. A threat to sue for the property stolen, will not exclude the proof of confession (*c*).

If the jury fix the imprisonment for petty larceny, it will be regarded as surplusage to the verdict of guilty, and the sentence considered as the act of the Court.

This was an indictment for larceny, found by the grand jury of Johnson county, against Mordecai H. Cropper, at

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(*c*) See 1 Greenleaf's Ev. § 229.

the May term, 1842. The errors assigned are as follows: —

1. In allowing the evidence of Malcolm Murray to go to the jury when excepted to, as will more fully appear in the bill of exceptions hereunto made part of the record.

2. In directing the jury to affix the amount of punishment.

3. Because the amount of punisment was not fixed and determined by the Court.

LOWE, for plaintiff in error.

CARLETON, for defendant.

*BY THE COURT, WILSON, JUSTICE. — The first ob- *260
jection will fully appear from the bill of exception, which is as follows: —

"Be it remembered, that on the trial of the above cause, Malcolm Murray, one of the firm of Murray & Sanxy, was examined as a witness on the part of the prosecution, gave the following testimony: 'I saw Cropper behind our store and called him. Says I, "Cropper, what have you been doing here all winter, stealing our wood?" He denied it, and I said, "If you don't pay us for the wood, I'll sue you." He wanted to know how I knew he had been stealing wood. I told him I could prove it by the best kind of evidence, and started off. He called me and said he had been taking chips to kindle his fire. I told him he was lying, and he then acknowledged that he had taken an armfull or two of wood. I told him he was lying. He then acknowledged that he did steal wood.'

"Cross-examined. 'At the time I talked with him my object was to get him to admit the taking of the wood, and the quantity he had taken, for the purpose of a settlement with him. I threatened him with suit, and tried to frighten him to get him to admit the taking of the wood. I put as strong a face on as I could. He appeared confused, and I appeared as rough as I could. My object was to make him acknowledge the taking of the wood, in order to effect a settlement with him for the same.'

"All which the counsel for the defence moved the Court to overrule, for the reason that the admissions aforesaid were made, if made at all, under the influence of a threat or promise made by the witness. Which motion the Court refused, and let the evidence to the jury, and thereupon the counsel for the defence excepted to the opinion of the Court, and asks the Court to sign this his bill of exceptions.

"J. WILLIAMS, Judge."

We think that the evidence of the witness, Murray, was admissible. If Murray had made any threat or promise in reference to the *criminal* charge against the defendant in the indictment, the confession would have been inadmissible. In Greenleaf's new work upon evidence, page 266, the following doctrine is laid down; that "A promise of some collateral benefit or boon — no hope of favor being held out in respect to the criminal charge against him, will not prevent the confession of the prisoner from being received." The threats of the witness made to the prisoner in this case, were merely in reference to a suit for the *261 value of *the wood, and no allusion seems to have been made in the conversation between them as to the criminal prosecution.

We will now proceed to consider the second and third objections. The record in this case shows that the jury, in finding their verdict, fixed the amount of punishment. On the 4th day of January, 1839, it was enacted by the legislature that "where any latitude is left as to the amount of punishment for any offense, the jury who try the offender shall, in all cases, fix the amount of punishment." On the 24th of January, 1839, the criminal code was enacted, which, in defining some crimes and affixing the punishment, declares that the amount of punishment shall be at the discretion of the Court, and in other cases it is silent upon this point. There is no conflict between these statutes except in those sections which require the Court to fix the amount of punishment.

Mordecai H. Cropper *v.* The United States.

Where nothing is said as to which tribunal shall fix the punishment, and latitude is left to the amount of punishment, the statute of the 4th of January, 1839, will apply. Where it is enacted that it shall be left to the discretion of the Court, the Court should fix it, the statute which so enacts it having been passed subsequent to the other. In reference to the particular offense for which the plaintiff in error was indicted, it was the duty of the Court to fix the punishment; the words of the statute being as follows: "That it shall be the duty of the Court, in all such cases, where the amount of property stolen, bought, or received shall be less than five dollars, to condemn the prisoner or prisoners, guilty, &c., to be imprisoned for a term not exceeding two years." It appears by the record that the Court complied with the statute, and that part of the verdict of the jury which alludes to the punishment may be considered as surplusage, and as not vitiating the preceding part of it, and, therefore, may be rejected.

MASON, CHIEF JUSTICE.— I concur in the foregoing decision, but base my opinion upon the ground that, in this case, it was the province of the jury to fix the amount of punishment. The 82d section of the act of January 4, 1839, page 119, enacts, "that where any latitude is left as to the amount of the punishment for any offense, the jury who try the offender shall, in all cases, fix the amount of punishment."

That provision, if unrepealed, applies to this case. The 38th section of the act of January 25, 1839, page 150, in relation to offenses of this kind, directs that it shall be the duty of the Court to condemn the prisoner for a term not exceeding two years. I do not suppose it was *the *262 intention of the legislature, by this latter statute, to repeal the provision of the former which has been above quoted. The last act directs the Court to condemn the prisoner to a certain amount of imprisonment, and he was so condemned. The sentence of the Court is perfectly compatible with the verdict of the jury, and also with the law.

Judgment affirmed.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF IOWA.

JANUARY TERM, 1844.

HON. CHARLES MASON, CHIEF JUDGE.
" JOSEPH WILLIAMS, } ASSOCIATE JUDGES.
" THOMAS S. WILSON, }

ANSEL HUMPHREYS, *v.* DENTON J. SNYDER.

Appeal from Muscatine.

An agreement between A and B that A is to execute a mortgage to B (as soon as he pays for and obtains a title to a lot), to secure the payment of a debt due to B, is not to be treated as a mortgage.

This was a bill in chancery, filed by Humphreys *v.* Snyder in the District Court of Muscatine, on the 30th day of April, 1842, to foreclose a mortgage, and at the June term a decree was rendered for the complainant.

The facts are sufficiently stated in the opinion of the Court.

R. P. Lowe, for complainant.

Hastings & Richman, for defendant.

*264 *Per Curiam, Williams, Justice. — The bill filed in this case sets forth that Snyder, the respondent, on the 26th of August, 1840, was indebted to the firm of Eno & Phelps, of the city of New York, in the sum of $610.31, and had, at the same time, an equitable interest in lot No. 1, block No. 33, in the town of Bloomington, with a dwelling and store-house situate thereon; that to secure the payment of the sum of money aforesaid the following article of agreement was entered into; to-wit: —

"This article of agreement, made this 26th day of August, one thousand eight hundred and forty, between Denton J. Snyder, of Bloomington, in the territory of Iowa, Eno & Phelps, of the city and state of New York, and Ansel Humphreys, of Bloomington, aforesaid, as follows; to-wit: —

"Whereas, said Snyder, as a member of the firm of D. J. Snyder & Co. is indebted to Eno & Phelps in the sum of six hundred and ten dollars thirty-one cents; and whereas, said Snyder is the owner of a certain lot in Bloomington, with the buildings and improvements thereon, which said lot is now occupied by the dwelling-house and store of said Snyder, and is known as lot No. 1, of block thirty-three, in the village plat of said town of Bloomington; and whereas, a deed for the same will be due said Snyder from the commissioners, or committee for the county of Muscatine, on the payment, by said Snyder, of the sum of forty-four dollars, which payment will fall due on or before the fifteenth of September next ensuing, the said Snyder hereby agrees for himself, his heirs, and assigns, and hereby does assign to the said Ansel Humphreys, in trust, and as agent for said Eno & Phelps, all his right, title, and interest to said property, for the security of the

payment of said six hundred and ten dollars thirty-one cents, to said Eno & Phelps, with the interest thereon. The said Humphreys, for himself, his heirs, and assigns, hereby agrees to release and re-assign the premises above described to said Snyder; provided, that on or before the fifteenth day of September next ensuing, he, the said Snyder, shall pay the balance due on said lot, and shall immediately make application for a deed, and by consent of said Humphreys shall procure the same, and shall, thereupon, cause and execute a mortgage on said premises to said Eno & Phelps, for the payment of said sum of six hundred and ten dollars thirty-one cents aforesaid, with the interest thereon, at seven per cent. Said mortgage to be made payable and due on the twenty-sixth day of February, eighteen hundred and forty-two.

"And it is especially agreed by said Snyder, for himself, his heirs, *executors, and assigns that no build- *265
ing or buildings shall be removed from said premises by himself, or by any person with his consent. And the said Eno & Phelps, for their executors, heirs, and assigns, hereby agree to wait said time of payment, in consideration of the fulfillment by said Snyder of the conditions hereby entered into by him, and will allow the said Snyder the occupancy of said premises for the term of said mortgage.

"And in case said Snyder does not pay said amount of forty-four dollars to the commissioners as aforesaid, so as to authorize them to execute a deed, or in case he refuses to execute a mortgage as aforesaid, or in case any of the conditions of said Snyder are not fulfilled, then the said Humphreys is authorized and hereby engages to dispose of said property under the direction of said Eno & Phelps, for the payment of said debt, or so much as it may pay thereon; and the balance, after paying necessary costs and expenses, to be paid, if any such balance shall remain, to said Snyder. In witness whereof, we have hereunto affixed

our hands and seals at Bloomington, in the territory of Iowa, this 26th day of August, 1840.

"D. J. SNYDER, [L. S.]
"ENO & PHELPS, [L. S.]
"By JOHN JAY PHELPS, one of the firm.
"ANSEL HUMPHREYS, [L. S.]
"In presence of
"LUCIA ANN HUMPHREYS,
"JAMES A. HUMPHREYS."

Upon the day of the execution of said instrument it was duly acknowledged by said Snyder, and recorded in Muscatine county, and thereupon said Eno & Phelps made an assignment of the same; to-wit:—

"We hereby transfer and assign to Ansel Humphreys our interest in the debt described within, together with the security thereon. The said Snyder having this day paid to us one hundred and twenty dollars thereon, per our receipt to him, which amount is to be deducted. The same, after said deduction, to be held by said Humphreys, for his own use and benefit, and at his own risk and responsibility, and we hereby relinquish all interest in the same.

"ENO & PHELPS.

"Bloomington, August 26, 1840."

The plaintiff claims that by said assignment he be-
*266 came the sole owner *of the interest in said debt, and entitled to the benefit of the aforesaid security, and that thereby the character of trustee, in which he formerly stood to the said Eno & Phelps, was annulled and destroyed. The complainant also charged that the said Snyder, although he had procured a title to the said lot from the commissioners of the county of Muscatine, had not performed the other part of the agreement, nor did he pay the money due the said Eno & Phelps, in accordance with the stipulations of said agreement. By reason of which said

failure, on the part of the said Snyder, to comply with all of the conditions of said agreement, the complainant claims that he holds a lien on said premises to the amount of the balance due, after deducting the payment made by said Snyder, and acknowledged by the assignment of said agreement to the complainant by the said Eno & Phelps, dated August 26, 1840, together with the stipulated rate of interest, and that he is entitled to a decree of this Court for the sale of said premises to satisfy the same. The bill was taken *pro confesso*, for want of an answer, after rule taken against defendant to answer by a day certain.

In considering this case, three questions present themselves; viz: —

1. What were the undertakings of the different parties to the agreement?

2. Which of the undertakings have not been performed?

3. What decree or order should the Court below have made in the premises?

This last question will involve the legal consideration of the agreement.

In considering the first question, we will inquire into the undertakings of the different parties separately, and in the order in which their names are affixed to the agreement.

What was Snyder to do?

1. He assigned all of his interest in the property mentioned, to Humphreys, *in trust*, and as agent for Eno & Phelps, for the security of the payment of the sum of six hundred and ten dollars and thirty-one cents, with interest.

2. He agrees to pay to the commissioners of Muscatine county, on or before the 15th of September, then next ensuing (1840), the sum of forty-four dollars, the balance due to said commissioners for this lot; which sum it was necessary that Snyder should pay in order to procure a deed in fee simple for the premises, and to make application to such commissioners for such a deed, and by consent of Humphreys to procure the same, and upon procuring a deed and

upon Humphreys re-assignment of the propcrty to himself to execute a mortgage of said premises to said Eno &
*267 *Phelps, for the sum of six hundred and ten dollars and thirty-one cents, with interest at seven per cent; said mortgage to be made payable and due on the 26th of February, 1842.

3. Snyder agrees not to remove any of the buildings from the lot.

4. In case of a failure, on his part, to pay the amount of forty-four dollars to the commissioners as aforesaid, so as to authorize them to execute a deed, or in case he refuses to execute a mortgage as aforesaid, or in case any of the conditions of him, the said Snyder, are not fulfilled, he authorizes Humphreys to dispose of the property under the directions of Eno & Phelps, for the payment of said debt, and to pay the residue, after payment of costs, expenses, &c., to himself (Snyder).

What did Eno & Phelps agree to do?

They agree to wait till the 26th of February, 1842, for the payment of the money; and to allow Snyder the occupancy of the premises for the term of said mortgage.

What did Humphreys agree to do?

He is to act in the character of trustee and agent, to reassign the premises to Snyder, provided Snyder shall make the payment to the commissioners, and thereupon execute the mortgage as aforesaid. He agrees, also, in case of a failure on the part of Snyder, to pay the amount of forty-four dollars to the commissioners, or in case Snyder should *refuse* to execute the mortgage aforesaid, or in case any of the conditions of him, the said Snyder, are not fulfilled, to dispose of the property under the directions of Eno & Phelps, for the payment of the debt, and to pay the residue, after the payment of costs, expenses, &c., to Snyder.

In proceeding to consider the second question; viz: which of the undertakings have not been performed, it will be necessary to advert to the allegations of the bill. The

bill charges, " that although the said Snyder has procured from the commissioners aforesaid a title in fee simple of the same, he has not performed the other conditions and stipulations of his agreement, nor has he paid the said sum of money specified in the said instrument, on the 26th day of February, 1842, agreeably to his undertakings. We infer from the bill that Snyder paid the forty-four dollars to the commissioners and procured the title pursuant to the agreement, and that none of the buildings were removed from the lot as the bill alleges; that he procured the title; and there is no complaint of a failure in these particulars. What other undertakings not performed will authorize the sale of the property? A refusal to execute the mortgage.

There is no allegation in the bill that there was a refusal to execute the mortgage; no allegation of demand of a mortgage. Snyder does not authorize Humphreys to sell the property in case he *(Snyder) does not make *268 and execute the mortgage. The mere non-performance in this particular is not the contingency which the article of agreement contemplates; it is the refusal which pre-supposes a demand from the other party. But the great error into which the complainant seems to have fallen is this: He has looked upon the agreement as authorizing the sale of the property, in case of the failure on the part of Snyder to pay the money on the 26th of February, 1842, and he sets forth the non-payment as the ground for asking the Court to decree a sale; whereas there is no undertaking on the part of Snyder, in this agreement, to pay this money; but as we before mentioned, he only agrees to perfect the title in himself; not to remove the buildings, and upon the perfection of the title in himself not to refuse to execute the mortgage. It was the mortgage which secured the payment of the money.

We will now proceed to consider the third and last question which is, What decree or order the Court should have made in the premises?

This article of agreement is not a mortgage, although upon certain contingencies it was to be a deed of trust. The Court below in entering the decree considered it a mortgage. In the decree of the Court the following language is used: "It appearing, to the satisfaction of the Court that the said mortgage was given by the defendant to secure the payment to the plaintiff of six hundred and ten dollars and thirty-one cents, with interest at the rate of seven per cent per annum, and it appearing that there is now due from the defendant to the plaintiff, including interest to this day, the sum of five hundred and fifty-three dollars and forty-one cents, it is therefore ordered and decreed," &c. The non-payment of the money and the amount due were the only matters found by the Court,—the only grounds of the decree.

These facts do not authorize a decree of sale of the property.

Being of the opinion that the bill of itself does not show sufficient equity, and that if the matters therein set forth were admitted to be true that the Court would not be authorized to decree a sale, we do not deem it necessary to examine any other objections presented in the case.

The decree of the Court below is reversed.

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*269 *Cox and Wife, *v.* Bunker and Wife.

Error to Washington.

To call a woman a "*whore*" is actionable without proof of special damages (*d*).

(*d*) Approved in Beardsly *v.* Bridgman, 17 Iowa, 290; see also Smith *v.* Silence, 4 Iowa, 321; Dailey *v.* Reynolds, 4 Gr. 354; Wilson *v.* Beighler, *et ux.* 4 Iowa, 427; Truman *v.* Taylor, *ib.* 424; Abrams *v.* Foshee 3 Iowa, 274. So, any words imputing to a female a want of chastity, are actionable *per se.* Cleveland *v.* Detwiler *et ux.* 18 Iowa, 299.

Cox and Wife *v.* Bunker and Wife.

This was an action on the case for slander, instituted in the District Court of Washington county, by Stephen Bunker and Louisa, his wife, against Cyrus Cox and Jane, his wife.

This case was tried at October term, 1843, and a verdict and judgment rendered for plaintiffs for $265.

The defendants below seek to reverse this judgment, because the Court instructed the jury that to call a female a *whore* was actionable, without proof of special damages.

The facts are explicitly stated in the opinion of the Court.

G. W. Teas, for plaintiffs in error.

Bates & Carleton, for defendants in error.

By the Court, Williams, Justice. — This is an action for words spoken. There was a verdict rendered by the District Court of Washington county in favor of the plaintiffs and against the defendants, and judgment entered thereon by the Court.

The errors assigned are as follows; viz: —

1. The Court erred in instructing the jury that to call a female a *whore* is actionable, without proof of special damages.

2. The Court erred in overruling the motion for a new trial.

3. The Court erred in overruling the motion in arrest of judgment.

There is but one question presented for decision to this Court. The motion for a new trial, as well as that in arrest of judgment, was based upon the point contained in the first error here assigned.

The declaration consists of several counts, setting forth that Louisa Bunker is the wife of Stephen Bunker, and as

plaintiffs, their suit was brought against the defendants for damages for words spoken by Jane Cox, one of the defendants, wife of Cyrus Cox, who is also made a defendant. The words laid in the declaration are as follows:—

"Mrs. Bunker is a whore, and I can prove it. Mrs. Bunker is a dirty, lying bitch and a whore, and
*270 I can swear to it and prove it. She had *cohabited with her brother-in-law, and that the children were not Stephen's; they were Jonathan Bunker's; Jonathan had given her a bee stand; she is a dirty bitch; a strumpet, and no better than a whore, and I can prove it. She is a nasty, stinking whore, and her children were no more Stephen's than they were your's. (Meaning Mrs. Blue's, the witness)."

The defendants pleaded the general issue and notice. Issue being joined, the cause was tried, and the jury found a verdict for the plaintiffs, and assessed the damages at two hundred and sixty dollars and costs.

Are the words laid in the declaration actionable? and can plaintiffs recover without proving special damage to have been sustained in consequence of the speaking of them? Our opinion is that they are actionable, and that proof of special damages need not be made to enable the plaintiffs to recover. In former times a different doctrine was held by the Courts; but now a rule which is founded in the soundest reason prevails. The reputation of a female for chastity, by the common consent of mankind, is regarded with peculiar jealousy. The condition of women is, therefore, as to this virtue, such, that if words such as are here laid were believed, she would be excluded from society, and set aside as infamous in the common sense of the term.

The rule which has been adopted in the case of Miller *v.* Parish, 8 Pick. R. page 385, is the proper one. Parker, Chief Justice, says, "It is objected that a false and malicious charge of fornication against a female will not sus-

tain an action of slander, because fornication is not a crime at common law, and is not punishable by statute with ignominious punishment. We do not think that the objection is valid; for whenever an offense is charged, which, if proved, may subject the party to a punishment, though not ignominious, but which brings disgrace upon the party falsely accused, such an accusation is actionable." By legislative enactment of this territory, fornication and adultery are made punishable by fine and imprisonment. Act of 1839, page 164. This act was in force at the time of the speaking of the words laid, and of the alleged commission of the crime imputed by the words spoken. Taking the case here presented, and in accordance with the universally received and approved doctrine, that the sense in which words are received by the world is that which Courts of justice ought to ascribe to them, a crime cognizable by the law and punishable by fine and imprisonment, is charged upon the plaintiff, Mrs. Bunker, and if true, would, by enforcement of the law, render her amenable thereto, and, by infliction of the punishment prescribed, bring her into disgrace. With this view of the *case the words laid down in the declaration are ac- *271 tionable. But in the case of Andres and wife *v.* Koppenheaffer, 3d Serg. & Rawle, 261, it is expressly decided that "to call a woman a *whore* is actionable without special damages, because the crime of fornication is indictable; and to call a married woman an adulteress is actionable, because indictable." We take it to be clear, in this case, that the offense imputed to the wife of the plaintiff by the words spoken would have subjected her to indictment and punishment by imprisonment, and, moreover, attached a moral turpitude inseparable from the crime of adultery. Therefore, it was not necessary to give proof of special damages to the jury on the trial of the cause below. To charge upon a woman that she is a *whore* would be likely to exclude her from the society of virtuous and respectable

people, and prevent her from such connections in life as would be promotive of her happiness. This appears to be, we think upon good authority, as precedent, the current of modern decisions, and we have no hesitation in giving our full consent to so righteous a principle.

The judgment of the District Court is affirmed.

JAMES M'KELL *v.* NEIL and WIFE.

Error to Des Moines.

The Supreme Court will not infer that a judgment by default in the Court below was on a different day than that which appears in the record.

After argument it is too iate to raise the objection that the errors have not been assigned by rule day.

GRIMES, for plaintiff in error.

ROBER, for defendant in error.

PER CURIAM, MASON, CHIEF JUSTICE. — The defendants in error brought suit against M'Kell, returnable to the October term, 1841. That term appears to have commenced on the twenty-first day of October, and a judgment by default was rendered against the defendant below on the twentieth day of the same month. This was clearly erroneous, for no default could legally have been rendered against the defendant until the second day of the *272 term. There is probably some clerical error in *this case, but we have no means of correcting that mistake, and must decide upon the case as it appears in the transcript.

The defendant in error insists that there was no assignment of errors filed by the third day of the term,

and that it is too late now to raise any points in the case. That circumstance, if available at all, should have been made the basis of a motion previous to the argument.

The judgment below will, therefore, be set aside, and the case remanded to the Court below for further proceedings thereon.

[NOTE. — At the next term of the Court it was made to appear that the error which caused the above reversal was clerical only. Thereupon the case was reinstated, and the judgment affirmed.

JOHN MCCONNELL *v.* ALMERON R. GARDNER.

Appeal from Johnson.

The Court will not entertain a bill filed by an elder of a church, in his name and right as an elder, to secure the title to a church lot granted to the church of which he is a member and elder (*e*).

The petition should be filed in the name of the church, and in the absence of an incorporation it should set forth the names of all the members of the association.

This was a bill in chancery filed by John McConnell, an elder of the first Presbyterian church of Iowa City, against Almeron R. Gardner, an elder of the Universalian society.

The complainant set forth that in November, 1840, acting as an agent and elder of his church, and under the provisions of, and in accordance with, an act of the legislature granting certain lots of land in Iowa City for church and literary purposes, made application to Chauncy Swan, then the acting commissioner, for the west half of the church reservation, in block No. 66, for the purpose of erecting a church thereon, and entered into a bond with two approved securities, &c. That it was positively his intention as elder and agent for said church to erect a build-

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(*e*) See Pipe *et al. v.* Bateman *et al.* 1 Iowa, 369.

ing for public worship, &c. That afterwards the defendant, Gardner, in behalf of the Universalian Society, well knowing the previous application of complainant, had *273 also presented a bond for said lot, and *had commenced operations to erect a church edifice, &c. The bill prayed an injunction, and general relief.

At the November term of the District Court, 1841, Judge Williams presiding, the defendant, by Reagan & Carleton, his attorneys, moved to dismiss the proceedings for the want of equity on the face of the bill, and because the complainant had full and complete remedy at law. The injunction was dissolved and the bill dismissed.

From which decree the complainant appealed to this Court.

This cause was elaborately argued by the counsel for the complainant and the defendant, and numerous authorities cited upon the points raised, but the opinion of the Court embraces all that is requisite to an understanding of the case.

Calkin & Lowe for complainant.

Reagan, Gilbert & Carleton for defendant.

Per Curiam, Mason, Chief Justice. — The first question arising in this case is whether there are proper parties thereto. Is the petition filed for and in behalf of McConnell, or of the church, or of both. Evidently McConnell himself is the sole complainant. It is true he sets forth that he is elder of the church, but is merely *discriptio personæ.* The petition sets forth the grievances of no person but himself — the remedy sought is his. "In consideration whereof and inasmuch as *your orator* is without remedy." — "May it please your honor to grant unto *your orator* a writ of summons." — "And may your honor also grant a writ of injunction to *your orator.*" These expressions, we think, clearly decide the character of the petition in relation to the party complainant.

That party is the mere agent of the church. It is true, he describes himself also as elder, but what are his functions by virtue of that office we cannot judicially know. An agent in a case like this should certainly file the petition in the name and behalf of his principal.

It would doubtless be more convenient to allow the agent to sue in his own name, but such a convenience can only be procured through an act of the legislature. As a general rule, all the members of a voluntary association should be joined in the petition, but to prevent the inconvenience and delay which such a requirement would occasion, where the members are numerous, Courts of equity have of late countenanced the mode of a part commencing proceedings in behalf of all. *But the petition in such *274 a case should set forth facts to justify that course.

In the present case it does not appear that the number of associated members is so great as to create inconvenience in having all their names joined. Nor is the proceeding instituted by McConnell in behalf of the association, but for himself alone, although it would be reasonable to infer that his success would redound to the exclusive benefit of the whole association. That is a matter, however, which should not be left to inference.

But it is said that McConnell has a personal interest in this matter, having signed the bond to the territory, in pursuance of the statute. So have the other two securities in that bond. Can either of them, therefore, bring suit in his own name? No; the petition should have been filed in the name of the Presbyterian church. In the absence of an act of incorporation it should have set forth the names of all the members of the association, or it should have been brought by some of the members for and in behalf of all.

It was also contended in the argument that the statute directed the deed to be made out and delivered to the agent, and that therefore the intention must have been

to vest the agent with the right to sue in this manner. This is clearly a *non sequitur*. The deed is to be given to the church, but to be delivered into the hands of its agent. The business is to be transacted by the agent, it is true, but it must be done in the name and for the benefit of the principal.

We think, then, that McConnell has shown no such interest in himself as to justify him in seeking a remedy in his own name; that, therefore, as between the present parties there is no equity in the bill, and that the decree of the Court below, dismissing the same, was correct, for that reason alone. It will therefore be unnecessary to consider the other points made in the case.

Judgment affirmed.

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*275 *JACOB MARSHALL and WILLIAM B. WHITESIDES *v.* JOHN D. BUSH.

Appeal from Dubuque.

Where A has a pre-emptory right to a lot of land belonging to the United States, sells the same to B and takes a mortgage to secure the payment of the consideration money, if B afterwards purchases the same land from the United States at public auction, and thus prevents A from obtaining the fee simple title, with power to fulfill his engagement, he, B, cannot set up his title from the United States in bar to the foreclosure of the mortgage (*f*).

The title which the mortgagee obtains enures to the benefit of the mortgagor.

William B. Whitesides, in 1839, claimed to own the legal interest in two lots in the town of Dubuque, numbered seven and one hundred and ninety-four (which was laid off by the United States), for the benefit of Jacob Marshall.

(*f*) See Wickersham *v.* Reeves & Miller, 1 Iowa, 413; State *v.* Lake, 17 Iowa, 215; Wilhelmi *v.* Leonard, 13 Iowa, 330; Vannice *v.* Bergen, 16 Iowa, 555.

Whitesides claimed to have the pre-emptive right to said lots and held the certificates of the commissioners for laying off the towns of Dubuque, &c., and that he was entitled to the pre-emption to said lots.

Marshall and Whitesides agreed to sell said lots to Bush for $3,000, and Whitesides conveyed to him by deed of general warranty. Bush paid down $1,500 and gave his note for the other $1,500, payable the first October following, and mortgaged the lots by deed of general warranty to secure the payment of the note, which was payable to Marshall.

Bush failing to pay the note when it became due, Whitesides & Marshall filed their bill to foreclose the mortgage, and for the sale of the lots. Bush, in his answer set up in defence: —

1. That at the time of the sale aforesaid Whitesides & Marshall had no pre-emptive right to the lots.

2. That after the purchase by him, as aforesaid, in September, 1840, Whitesides relinquished his right of pre-emption to the lots, against the will of Bush, and that they were put up to public sale, and that Bush became the purchaser of one of the lots and Whitesides of the other, and that the sale and purchase, as aforesaid, released Bush from all obligation to pay the residue of the purchase money.

The Court below, by their decree, found that there was due at the date *of the decree, July 12, 1842, *276 for principal and interest, the sum of $1,608.82, and decreed a foreclosure of the equity of redemption and a sale of the property to pay the balance due.

The testimony adduced showed that at the time of the sale Whitesides had a certificate from the commissioners for the pre-emption of said lots. That Whitesides & Bush were in possession of the property sold by their tenant; that they assigned the lease to Bush, and he went into possession of the same, and had continued in quiet posses-

sion thereof. That said lots were improved at the time, and that Whitesides then, and prior thereto, claimed the same under the original takers up and improvers, and had continued in such possession up to the time of the sale to Bush, as aforesaid; that at the time of sale the house and lots were under rent at $70 per month.

That subsequent to the sale such proceedings were had in the land office at Dubuque, that the certificates of pre-emption aforesaid were not allowed by the land office, and Bush was refused the right to enter the lots by pre-emption. By agreement, Bush was to enter the lots and furnish the money for so doing. That in order to perfect the title to the lots, Whitesides informed Bush that he should relinquish his right to them to the United States, and that Bush would attend the sale and buy them in, under his contract with Whitesides; he would make no opposition to his so doing. But that he, Bush, would not do this; that he, Whitesides, would buy in the lots himself in order to make good the title to Bush.

That Whitesides did accordingly relinquish, and made arrangements to purchase, as aforesaid, of all of which Bush had due notice.

That the lots were put up at public sale and Whitesides became the purchaser of lot No. 194, and by his agent bid for No. 7, but that Bush overbid him, and became the purchaser thereof. That Whitesides and Bush were the only bidders for the lot.

The decree in favor of the complainants was made at the February term, 1842, Judge Wilson presiding. And is as follows; to-wit:—

"And now at this day comes the complainants, by Davis & Crawford, their solicitors, and the respondent, by John V. Berry, his attorney, and the Court being ready to decide this cause upon the pleading, exhibits, and testimony produced by the parties, and the solemn arguments thereupon had at the last term of this Court, do find that the respon-

dent executed his note and gave his mortgage upon lots Nos. 7 and 194, in the city of Dubuque, as designated in the government plat thereof, for the securing the payment of one thousand five hundred dollars of the principal of said *note, as the complainants in their bill of com- *277 plaint have alleged. And the Court doth further find that no sufficient matter has been shown and sustained by the defendant to exempt said property from the liability of said mortgage; and the Court doth further find that of the said note of one thousand seven hundred and ninety dollars, fifteen hundred dollars of which was secured by said deed of mortgage mentioned in the pleadings, there remains due one thousand six hundred and eight dollars and eighty-two cents. The Court doth therefore judge and decree that the respondent pay to the said Jacob Marshall, the payee of said sum of one thousand six hundred and eight dollars and eighty-two cents, with interest thereon at six per cent per annum until paid, within ten days from the date of this decree, together with the costs of the complainants about their suit in this behalf expended, to be taxed by this Court. And in default thereof, the Court doth hereby order, adjudge, and decree, that the said lots and appurtenances be sold by the sheriff of this county, as lands are sold under execution, issuing from the common law side of said Court, and that said complainants have execution for the said sum of one thousand six hundred and eight dollars and eighty-two cents, and costs of suit, in case default be made in the said payment."

From which decree the defendant appealed to this Court.

Davis & Crawford, for complainants.

Berry, for defendant.

Per Curiam, Mason, Chief Justice.— The petition in this case sets forth the ordinary case for the foreclosure of a mortgage. The answer admits all the material allega-

tions in the petition, but sets up new matter in avoidance. This requires proof. Did this proof fully sustain the allegations in the answer, the defense would be complete. Such misrepresentation and fraud are charged in relation to the transaction as, if true, to render the whole invalid.

The first and most material of these allegations is, that the complainants represented to the defendant that they had a perfect pre-emption right to the town lots which are the subject of the mortgage now sought to be foreclosed, at the time of the sale and mortgage as set forth in the petition in this case, *and that they well knew at the time that they had no such pre-emption right.*

The proof sustains this allegation so far as concerns the representation aforesaid, but fails to show that they knew the same to be false; so far from this it does not ap-
*278 pear, but that the statement itself was literally *true.

It is abundantly proved that one of the complainants had the pre-emption certificates from the commissioners for the lots in question, and for aught that appears, those certificates were genuine and valid. Their very representations to that effect, when called for as admissions, are legitimate testimony on the subject, sufficient to establish the fact itself, unless disproved.

The only circumstances I recollect tending to disprove that conclusion are, that Whitesides relinquished his certificate, and that Bush was unsuccessful in endeavoring to obtain a title from the land office by virtue of the certificate. These circumstances are by no means conclusive and hardly sufficient to counterbalance the evidence on the other side, and furnish no proof whatever of a *fraudulent misrepresentation.*

Similar allegations of fraud are also made in relation to the bar fixtures, as well as to the ability and punctuality of Hale, in relation to making payments, but these seem wholly unsupported by proof. The charge of fraud is, therefore, altogether unsustained.

The illegality of the transaction is also relied upon as another ground of defence, but, as it seems to me, without any good reason. This Court has often decided that traffic in the public lands, even before the obtaining of a pre-emption, was contrary neither to the laws nor policy of the general government. Much less can the contract in this case be illegal, which was made in relation to land for which certificates of pre-emption had previously been issued by commissioners acting by the authority of Congress. There was no contract that the defendant should not bid at the public sale.

A third class of objections set forth in the assignment of errors, refers to a want or failure of consideration for the mortgage in question. It is said that inasmuch as the mortgage was given to secure the purchase money for the lots sold by complainants to defendant, and inasmuch as the complainants are, by their own act, made unable to convey one, and the most valuable of those lots, they have no right to the purchase money remaining now due. We are left much in the dark with regard to the sale from complainants to defendant. It is alleged on the one side and admitted on the other, that such a transaction took place, but the deed is not exhibited and we are uninformed as to the real nature of that transaction. Was that instrument a deed of warranty or a mere quit claim? If the latter, the defendant is clearly remediless where there has been no fraud.

But suppose it to have been a deed of warranty, has there been a breach of that warranty? If so, has not such breach resulted from the *act of the defendant *279 himself? The defendant has certainly received no detriment from the course events have taken. He has obtained a perfect title by the payment of the purchase money to the United States, which is exactly what he had contracted for. If he has paid more than the minimum price, the necessity of so doing resulted from his own act. But

there is no stipulation that he should only pay the minimum price. Had he not interfered in the matter, the complainants would have fulfilled their engagement to him. There were no bidders at the sale but the parties to this suit. It is true, the defendant had a perfect right to bid at the public sale, but if by so doing he prevented the complainants from being able to fulfill their contract with him, he has no right to complain, especially as no damage has resulted to him on that account.

The case of Hull *v.* Cunningham's executors, 1 Mun. R. 330, corroborates the position here taken to the fullest extent. In that case A had purchased a tract of land of B, embraced within certain boundaries. Contrary to the supposition of both parties, it was afterwards ascertained that a considerable portion of the tract was not owned by B, but was government land belonging to the state. A, upon learning this fact, entered the land himself, and then filed his bill for a *pro rata* reduction of the amount of the purchase money. The Court held that all A had a right to claim was the amount he had advanced for the entering of the land, together with a reasonable compensation for his trouble; a rule which, applied to this case, would leave the defendant remediless on the point we are now discussing.

As to the relinquishment by Whitesides in opposition to the wishes of Bush, that is a matter to which no valid objection can be made by the latter. At their own peril the complainants had a right to take that step. Had they failed to secure the property without any interference from Bush, he would then have had his remedy. But in order to be in a condition to take advantage of that measure, he ought not to have been himself the cause of its failure. If the complainants were irresponsible so that he would have been unsafe in relying upon his remedy over against them, he would have been perfectly right in bidding at the sale or taking any other step proper for securing his own interest,

but the most he could claim against the complainants in such a case would be a compensation for the expense to which he had been subjected by their relinquishment, which in the present case is just nothing at all.

The counsel for the defendant treats this case as though it were a bill filed to enforce a specific performance. Under the old English law and practice, such a view of the matter would have been more correct. But *under *280 the law and practice in the United States generally, and particularly in this territory, the foreclosure of a mortgage is very different from the enforcing of a specific performance. It is a means provided by law for the collection of a debt. The debt is the principal; the mortgage merely the security. The mortgagee does not obtain possession of the property mortgaged, but such property is sold for the purpose of discharging the debt. It is no more the enforcing of a specific performance than is the sale of a house on a proceeding under the mechanics' lien law.

Much is said of illegal combination and the countenance which this Court may give to it, but these observations seem to me to be founded in but a slight degree upon the evidence in the case. But, even if all the facts to which the counsel alludes had been set forth in the evidence, it is doubtful whether it would have made much change in the result. We cannot step out of our legitimate path to punish offenses, however much they may be deserving of it. If the complainants have been guilty of an offense let them be punished according to law, but they are not thereby become outlaws, so that Courts of justice are to be closed against them. Their illegal proceedings, if there were any such, have not been so connected with and incorporated into this transaction as to render the whole invalid. The deed from one of the parties, and the mortgage from the other, were legally given, and if there was an illegal combination in relation to the bidding at the public sale, it was wholly

inoperative so far as this case is concerned. At all events it was no part of this transaction.

But it is contended that this Court has no right to foreclose this mortgage, inasmuch as it would create a title in opposition to the laws of the United States. If it would have such an effect, the proposition would be evidently correct. But it would have no such an effect unless it can be shown that where lands are purchased from the government those lands can never afterwards be sold for debt.

Bush mortgaged lands to which he had not a good title. Such a title was, however, afterwards obtained. This enures to the benefit of the mortgagee. 1 Powell on mortgages, 190. Counsel seem to entertain an idea that there is some magic in a title obtained from the United States. Such a title is, however, endowed with no peculiar attributes. It is to be considered on the same footing with one obtained from an individual, and treated in the same way. It is just as liable to be sold on execution. If land is mortgaged, and aftewards such a title is obtained, it enures in equity to the benefit of the mortgagee in the same *281 manner. The *foreclosure of this mortgage will not be creating a title in opposition to the laws of the United States. It will be merely directing lands to be sold for the purpose of discharging a debt secured by mortgage upon those lands which, by the general rules of law, are made subject to such mortgage.

It is also contended that lands are not subjected to the control of our laws until a patent has issued for the same. I think there is no evidence in this case showing that a patent has not issued, and the party relying upon a fact to support his case must show that fact. But suppose the patent has not issued, our law makes the receiver's receipt evidence of title. But here, again, the counsel for the defendant insists that such a law is of no force, and cites the case of Wilcox *v.* Jackson, 13 Peters, 498. In that case the decision went no further than to declare that where a

patent has not issued for a part of the public lands, a state has no power to declare any title less than a patent, valid *against a claim of the United States, to the land, or against a title held under a patent granted by the United States.* I know of no authority denying to a state or territory the power of rendering the receipt of the receiver evidence of title, unless the same comes into collision with a patent or with a claim of the United States. Neither of these are set up in the present instance.

Another point made by the appellant in this case is that there should have been a deduction made for the fixtures that belonged to Hale; but I think this point is unsustained by the testimony. The deed to Bush not being made an exhibit, we are unable to say whether the fixtures were sold to him or not. The party claiming the deduction should have shown affirmatively his right thereto.

I think, therefore, the decree of the Court below should be affirmed.

Lowe & Hickok, plaintiffs in error, *v.* Ganby, defendant in error.

Error to Des Moines.

A plaintiff in an action of assumpsit, founded upon a book account, is not allowed, upon his own motion, to introduce his books of entry as evidence in his own behalf (*g*).

*Our statutes in relation to this species of evidence have changed the rules which, at common law, allowed a party to testify to the correctness of any item charged in the demand or set off. *282

(*g*) A contrary rule is established by statute and adjudicated cases. Rev. § 3999; Lord *v.* Ellis, 9 Iowa, 301; Hanson & Hanson *v.* Kirtly, 11 Iowa, 565; Eyre *v.* Cook, 9 Iowa, 185; Vieths *v.* Hagge, 8 Iowa, 163; Young *v.* Jones, *ib.* 219; Snell & Butterworth *v.* Eckerson, *ib.* 284; Sloan *v.* Ault, *ib.* 229; Anderson *v.* Ames & Co. 6 Iowa, 487; Burnell, Gillett & Co. *v.* Dunlap, 11 Iowa, 446.

Lowe & Hickok *v.* Ganby.

This was an action of assumpsit, brought by Jacob Ganby against Enos Lowe and Luther W. Hickok, partners, &c.

The declaration contained three counts: 1. For goods sold and delivered. 2. For drugs and medicines sold and delivered. 3. On account stated.

Plea, general issue. Verdict and judgment for the plaintiff for $120.

From the bill of exceptions taken in this cause it appears that on the trial below, the plaintiff, after introducing evidence to the general correctness of his books, and the delivery to the defendants below of some of the items in his bill of particulars, and that he, Ganby, had no clerk during the time that the account accrued, proposed to introduce his books of original entries, and be sworn himself as to their correctness, to which the defendants below objected, but the objection was overruled, and the plaintiff sworn and examined; that the plaintiff had instituted suit against Lowe & Hickok in their partnership character for the recovery of a number of items, some of which were charged to Dr. Enos Lowe, in his individual character, and some to Lowe & Hickok, for which defendants moved for a non-suit, which motion was overruled.

Lowe & Hickok brought their writ to reverse the judgment below, and assign for error: —

1. The Court erred in allowing the plaintiff below to be sworn, and to introduce his own books of entry, on his own motion, as evidence in his own behalf, as set out in the first part of bill of exceptions.

2. The Court erred in not excluding the individual items of plaintiff's demand in the Court below.

3. The Court erred in rendering judgment against Lowe & Hickok for the individual items of account charged against Lowe & Hickok, as per second part of bill of exceptions.

4. The books of supposed original entry of plaintiff below were improperly introduced as evidence to the jury.

5. The Court erred in not instructing the jury as in case of a non-suit.

HENN, MORGAN & STOCKTON, for plaintiffs in error.

HUGINS & MILLS, for defendant in error.

PER CURIAM, MASON, CHIEF JUSTICE. — The main *283 question to be *considered in this case is whether the admission of the book of original entries of the plaintiff below, in the manner set forth in the bill of exceptions, was regular and legal. Such books of entries are admitted as evidence by the Courts of most of the states of the Union, under regulations differing somewhat in the different sections of the country.

We shall, therefore, feel constrained to regard evidence of this nature (in some form or other) as legitimate, unless our statute has so changed our condition as to require its exclusion.

The admission of testimony of this nature is a radical departure from one of the fundamental rules of evidence, by permitting a party to manufacture proof for himself. But, from the necessity of the case, such evidence has been deemed admissible, the Courts deeming it better to disregard even a salutary rule of law than to leave a large class of creditors remediless.

Our statute, however, has done away with this necessity. It allows the creditor to summon the opposite party as a witness, and lest his ignorance or want of memory should leave the evidence defective, the act of January 28th, 1842, which was in force when this cause was tried below, provides "that upon the examination of either party upon the application of the opposite party in any suit in any Court in this territory, said suit being founded on contract, should said party be unable to testify to the correctness or incorrectness of any item or items in the demand or set-

off, the party wishing said demand or set-off shall be allowed to swear to the correctness of said item or items, provided they shall have been charged by him in a regular account; and he shall prove, by competent testimony, that he is in the habit of keeping his account or accounts correctly." Statutes of 1841–2, page 21.

We think that after the enactment of these statutes the argument of "necessity" had ceased to have its force. The creditor was no longer destitute of testimony to prove his demand. The law had established a rule different from that settled upon by the Courts. It covered the same ground, was of paramount obligation, and, therefore, superseded the other. It prescribed the conditions upon which a creditor might swear to his own account. It authorized this to be done where the debtor, having been first called upon, refused to swear, or if, when sworn, his knowledge or recollection was defective; provided, the creditor should first prove that he was in the habit of keeping his accounts correctly. What necessity for this statutory provision, if it was the intention of the law to allow the creditor to be sworn in the manner permitted by the Court below in the present case? Why give him *284 the privilege of being *sworn after he had first called upon the opposite party, if he had the right of being so sworn in the first instance? We think it may be fairly inferred that the statutory provision we have been considering was intended as a substitute for any and all the rules on this subject which had been established by the Courts. At all events, it did away with the necessity of the latter, which was its sole foundation.

It will be objected that, by the statutory rule a great hardship is imposed upon the creditor, he being bound to trust his whole case to the veracity of his antagonist. True, but is it more unreasonable to rely upon the oath of the debtor than upon the book of entries of the creditor? The proper answer to this question becomes the more evi-

dent when we reflect that the one, in giving credit, performs a voluntary act. He can protect himself from loss by refusing to trust his customers. But the debtor has no such protection against a dishonest trader, whose books may contain charges of goods never sold; and, although the salutary rule which requires proof that some of the articles were delivered, prevents a person from being placed wholly at the mercy of the books of one with whom he has never had dealings, still, he must be prudent and distrustful to a most extraordinary degree if he does not, by the purchase of one or two trifling articles, render himself liable to a trumped up amount of hundreds of dollars by one who is sufficiently dishonest to resort to such villainy. We think, therefore, so far from the existence of a necessity for the continuance of the rule established by the Courts, the statutory rule is far preferable. The reason, therefore, for the departure from the good old common law rule of evidence having ceased, we regard it as the duty of the Courts to retrace their steps, and to abrogate their rule, which had nothing but necessity for its justification, even although the statute may not directly require it.

The judgment below will, therefore, be set aside, and a new trial ordered.

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*Cornelius Cravens *v.* Emily Cravens *et al.* *285

Appeal from Van Buren.

A mere verbal promise of A to borrow money and purchase lands of the United States in the name of B, does not constitute an agency, and cannot be the basis of a decree for the conveyance of the lands so purchased by A to B, upon a bill filed for that purpose.

This was a bill in chancery, filed by Cornelius Cravens against Emily Cravens, the administratrix, and the chil-

dren and heirs of Oscar Cravens, deceased, for the conveyance of a tract of land purchased by the said Oscar, as it was alleged, as agent of said complainant. At the April term, 1842, the bill was dismissed at complainant's costs. From which decree the complainant appealed to this Court.

The supposed grounds of equity are contained in the opinion of the Court.

HUMPHREYS, for complainant.

WRIGHT, for defendant.

PER CURIAM, MASON, CHIEF JUSTICE. — The bill in this case sets forth that, in the year 1839, the complainant settled and made valuable improvements upon the west half of the south-west quarter of section thirty, township sixty-eight, north of range eleven, west. That at the land sale in 1840, not having money to enter the same, he made an agreement with his son, Oscar Cravens, by which the latter was to attend said sale, borrow the necessary money, and purchase the land in the name of the complainant, and as his agent. It further alleges that the said Oscar Cravens, intending to deceive and defraud the said complainant, procured the said tract of land to be purchased in his own name, and that he afterwards died, leaving a wife and two children who are the real parties defendants in this suit. That administration of the estate of his said son was subsequently granted to the wife of the deceased, one of the defendants in the bill, and that he, the said complainant, afterwards tendered to her the amount of purchase-money of the said tract, but that she refused to execute a deed therefor.

The answer denies that Oscar Cravens purchased
*286 the land as agent *for the complainant, but that it was entered by the said Oscar in his own right, and

that there was an agreement and understanding between the said complainant and the said Oscar that this land, which was timbered land, together with an equal tract of prairie land, which was to be entered by the said complainant, should be each equally divided between the two parties. It then alleges an offer on the part of Oscar Cravens to perform said agreement.

The proof, instead of overturning the answer, tends rather to support it. The most that is testified to by any of the complainant's witnesses is that the said Oscar was to borrow money, go to the land sales, and purchase the land in the complainant's name. This would not constitute an agency. It is a mere verbal promise, and (for aught that appears) without consideration, to do a certain act, and cannot be the basis for a decree for a conveyance.

The decree is, therefore affirmed.

JESSE WRIGHT, plaintiff in error, *v.* MARTIN A. BRITTON, defendant in error.

Error to Van Buren.

Where a declaration in slander contains two or more counts, charging slanderous words to have been spoken at different times, and the words charged in one count are proved to have been spoken on the very day laid in that count, if the defendant proves a justification for speaking the same, the words contained in a second count, if spoken in August previous to those alleged and proven in the first, will not support the action of slander (*h*).

This was an action of slander, instituted by Martin A.

(*h*) Whether this rule would apply under our system of pleading under the Revision, *query*.

Britton against Jesse Wright. A trial was had at the September term, 1842, and a verdict and judgment rendered for the plaintiff for twenty dollars damages and costs.

To reverse this judgment the defendant below has brought up the cause by a writ of error.

The exceptions to the action of the Court below are embodied in the opinion of the Court here.

*287 *HALL, for plaintiff in error.

WRIGHT, for defendant in error.

PER CURIAM, MASON, CHIEF JUSTICE. — The errors assigned in this case all rest upon the following bill of exceptions: —

"Be it known, that on the trial of this case the defendant asked the Court to instruct the jury that, if the defendant has given evidence proving slanderous words spoken on the day laid in the declaration, that words spoken in August previous to the time laid in the declaration could only be evidence to be considered by the jury as evidence of malice, and that if they found the defendant justified in speaking the words on the day laid in the declaration, that the jury could not find the defendant guilty of the former speaking. Which instruction the Court refused, but instructed the jury that they might find the defendant guilty of the former speaking; provided, the words were charged in the declaration, and in another count."

The instruction of the Court which is here excepted to we understand to be substantially as follows: "That, where a declaration in slander contains two or more counts charging slanderous words to have been spoken at different times, and the words charged in one count are proved to have been spoken on the very day laid in that count, if the

defendant proves a justification for speaking the same, then words contained in a second count, if spoken in August previous to those alleged and proven in the first, will not support the action of slander."

As this case is submitted without argument, and as we see no ground for the position assumed by the plaintiff in error, we shall content ourselves with simply affirming the judgment of the Court below.

JEREMIAH BURGE, *v* BURNS and SNYDER.

Appeal from Muscatine.

An appeals lies, although the decree was for less than twenty-five dollars. Where the answer, if true, is an insufficient defence, the proper course is to set the cause for *hearing on the bill and answer, which is tantamount to a demurrer in an action at law (*i*). *288

A writ of error, where a proper bond is filed, operates as a supersedeas on the judgment below. A writ of error is a writ of right, and lies from a judgment by confession.

The suing out of an injunction, which operates as a release of errors in a judgment at law, does not so operate where it is designed to enjoin, proceedings in *violation* of *law*.

This was a bill filed by Jeremiah Burge against Christopher Burns and Denton J. Snyder, in the District Court of Muscatine, to enjoin execution on a judgment at law.

The complainant stated that Christopher Burns, at the June term, 1841, obtained a judgment against him for $230 damages, and $98.60 cost; that agreeably to the provisions of an act of the legislature, he was entitled to a stay of the judgment for the space of six months, which

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(*i*) Under the Revision, the right of appeal is not limited to the amount in controversy.

he embraced by giving John Burge his security according to law, and which time expired on the 23d December, 1841. That on the 8th day of December, 1841, anterior to the stay of execution, he applied for and obtained a writ of error, executed his bond according to law, and removed the judgment, and all proceedings to the Supreme Court. That afterward, to-wit: on the 5th January, 1842, the said Burns sued out his execution on the judgment, which was placed in the hands of Denton J. Snyder, sheriff of Muscatine county; and that a levy had been made, &c. Prayer for subpœna and injunction. The judge allowed the injunction, and the bond for was regularly executed.

The answer of Burns acknowledges the judgment in his favor, by the voluntary confession of Burge, and the execution of the bond for stay of execution; denied the ordering of execution on the judgment against Burge, but that he ordered execution against Jeremiah and John Burge, on their replevin bond, &c.; alleged that the judgment being by confession, Burge had no right to sue out a writ of error, and denied notice of the writ; and that, although the original judgment might be removed to the Supreme Court, not so as to the replevin bond, which remained, as he was advised, in full force below.

A motion was made to dismiss the bill and dissolve the injunction, which was overruled.

There was a general demurrer to the answer, which was sustained, and at the December term, 1842, proceedings were restrained under the execution until the determination, by the Supreme Court, of the errors assigned; and a decree against Burns for the costs, taxed at $11.01.

*289 *From which decree the defendant appealed to this Court.

At the January term, 1843, of this Court, the appellee, by Lowe, his attorney, moved to dismiss the appeal because the decree appealed from was less than twenty-five dollars, exclusive of costs.

Jeremiah Burge *v.* Burns and Snyder.

PER CURIAM, MASON, CHIEF JUSTICE. — This was a motion to dismiss, on the ground that the decree appealed from was less than twenty-five dollars. One act, passed in 1839, provides for such appeals only in cases where the decree appealed from is final, and shall amount, exclusive of costs, to the sum of twenty-five dollars. Laws of first session, page 378. And the act passed the same year provides for appeals in all cases. Laws of Iowa, page 138. This discrepancy between the two statutes is put to rest by the Organic Act, the ninth section of which provides, among other things, that "Writs of error, bills of exceptions, and appeals in chancery causes shall be allowed *in all cases* from the final decisions of the said District Courts to the Supreme Court, under such regulations as may be required by law." Under this power to *regulate*, the legislature cannot *prohibit;* the right of appeal from the District to the Supreme Court "in all cases" is sacred. Any act of the legislature restricting that right to a certain class of cases is, therefore, invalid. The motion to dismiss will, therefore, be overruled.

WHICHER, for appellant.

LOWE, for appellee.

PER CURIAM, MASON, CHIEF JUSTICE. — The proceedings in the Court below were not in accordance with the practice in chancery cases. Where the answer, if true, is an insufficient defence, the proper course is to set the cause for hearing on bill and answer, which is tantamount to a demurrer in an action at law.

But inasmuch as no objection seems to have been made to the course of proceeding below, we shall regard the case the same as though, instead of a demurrer to the answer, the equivalent measure had been adopted, and the cause been set for hearing on bill and answer. This is, in substance, the case that was discussed and decided below, and which has been brought up and argued here.

The question, therefore, to be now considered, is whether the answer, if true, presents such a case as to justify a dissolution of the injunction and a dismissal of the bill. That answer admits the obtaining of a judgment, the stay of execution, the suing out of a writ of error before
*290 *the expiration of said stay, and the filing of a bond for a supersedeas, which was all that was then necessary to obtain such supersedeas. See laws of 1839–40, page 113. It further admits that after said supersedeas had been obtained in manner aforesaid, the plaintiff in the case ordered an execution to be issued against the said complainant and his security in the stay bond, given in the case as above set forth.

For the defendant it is contended that the writ of error and supersedeas should not have prevented the issuing of an execution on the stay bond. The statute declares that every writ of error (where a proper bond shall have been given) shall operate as a supersedeas upon the judgment. How then could an execution issue upon the stay bond, the very effect of which would be to carry the judgment into full effect?

But it is urged that the writ of error should not have had the effect of a supersedas in this case.

1. Because the original judgment had been by confession. Neither the bill nor the answer shows this to have been the case.

2. Because the stay bond, being declared by statute a judgment confessed, operated as a release of errors. The fact that a judgment is by confession, does not prevent the suing out of a writ of error, nor the operation of a supersedeas. There may have been substantial irregularities and errors in obtaining that very judgment by confession, for which this Court will feel bound to reverse it. A writ of error is a writ of right, and by complying with certain prerequisites, the law then in force entitled the plaintiff in error to a supersedeas. Where such a writ has issued in

pursuance of law, it must not be disobeyed on the ground that there had been a judgment by confession, and that consequently the plaintiff in error could not succeed in reversing the judgment. If he proceeds with a groundless case he must abide the consequences which the law affixes to the prosecution of a writ of error for mere delay, but the defendant in error must pursue his legal remedy and not disregard a supersedeas which is given without qualification by statute

Finally, it is urged that the very suing out of the injunction operated as a release of all errors in the judgment at law; such being the express declaration of the statute. See laws of 1838–9, page 352. That statute, however, is not applicable to the present argument. It contemplates a case where the injunction is brought to enjoin proceedings *at law*, not those in violation of law.

In the present instance a supersedeas had issued to stay proceedings on the judgment below. The plaintiff in that judgment had, however, disregarded this writ, and setting it at defiance, was proceeding to issue *his *291 execution and levy upon the defendant's property. The injunction was issued not to stay proceedings *at law*, but to stay proceedings *contrary to law*. Where a party is proceeding clearly in violation of law, no one can reasonably suppose that the very act by which those illegal proceedings are enjoined and restrained, sanctions and legalizes them. If such were the law, a party would only have to place a sham execution in the hands of the sheriff, and if the defendant therein should seek his remedy by an injunction, he would thereby legalize this outrageous act and cut himself off from all remedy — a proposition so monstrous as to need no refutation. Now, an execution issued after the taking effect of a regular supersedeas, is no more legal than though it had no judgment at all for its basis.

We think the Court below, therefore, decided correctly in sustaining the demurrer to the defendant's answer, and the decree thereupon must be affirmed.

Albert Hurd *v.* Dutchess County Bank.

Appeal from Dubuque.

Where the same proof may be had in a Court of law as that sought by a bill of discovery, the Court will not entertain it.

The facts in this case may be gathered from the arguments of counsel and the opinion of the Court.

Davis & Crawford, for complainant.

This is a bill brought for discovery to aid the complainant in a defence in a suit at law, and was heard in the Court below on a demurrer to the bill, and the bill was dismissed and is brought into this Court by appeal.

The allegations in the bill being confessed by the demurrer, the only question that arises before this Court is, does the bill show a case requiring a discovery by the defendants?

It is contended on the part of the complainants that this bill does show such a case. The requisites are: —

1. The bill must show such a case as renders the *292 discovery material *to the plaintiff in the bill to support or defend a suit. Story's Equity, vol. 1, p. 258, § 317.

2. It must show that the plaintiff has a title and interest, and what that title and interest are. *Ib.* § 318.

3. It must also show a case which will constitute a just ground for a suit or defence at law. *Ib.* p. 259, § 319.

It must also state that the discovery is asked for the purpose of some suit brought or intended to be brought. *Ib.* 261, § 321, and also the nature of the suit, *Ib.* It must also show that the defendant has some interest in the subject matter. *Ib.* 363, § 323. It must also set forth in particular the matters to which the discovery is sought. *Ib.* § 263. See, also, 2d Story Chancery Com. § 1490, and on.

"A party may maintain a bill of discovery, not only when he is destitute of other evidence to establish his case, but also to aid such evidence, or to render it unnecessary." Story's Equity Pleading, 260–1, in note; Hare on Discovery, 1, 110; Montague *v.* Dudman, 2d Vesey, 398; Wayram on Discovery, 4, 5, 25; Brereton *v.* Gamul, 2d Atk. 241; Finch *v.* Finch, 2d Vesey, 492; 2d Story's Com. Eqt. p. 701.

Bills of discovery are greatly favored in Equity. 2d Story, p. 704. The principal grounds on which a bill of discovery may be resisted are enumerated in 2d Story, Chapter 41, § 1489.

BERRY, for defendant.

The bill in this case shows that the complainant had a complete remedy at common law without the aid of a Court of equity. The complainant has joined in his bill as defendants, persons who might have been used as witnesses in the suit at law to prove the facts which he alleges do exist. Nothing would exclude them from testifying in a Court of law as well as in a Court of chancery. "If the facts lie within the knowledge of witnesses who may be called in a Court of law, that furnishes a sufficient reason for a Court of equity to refuse its aid." 1 vol. Story on Equity, 90, 91, § 74; also 1 John. Chancery Reports, 643; 4 John. Chancery Reports, 409. The bill shows that the complainant can prove the facts which he wishes to discover in the suit at law by other testimony than the plaintiff in that suit, but the ground upon which Courts of equity grant relief is that the facts cannot be proven by any other person than the party in the suit. See same section last above. The bill charges, but does not even allege, the fact that the complainants' witnesses have gone to parts unknown, and that another, he believes, has partially lost his mental faculties, so that he *can- *293 not be relied upon. The complainant does not give the names of his witnesses, nor even the place of resi-

dence of this imbecile, who has lost his mental faculties, and whom the complainant thinks cannot prove enough for his case.

The Court will see from the whole of the complainants bill that it is a mere disguise set up to change the place of litigation. Morton Swift, Wm. Stevens, Olive E. Chamberlin, and Moses Swift are in no manner connected with the suit at law, and could have been used as witnesses in that suit, had the complainant seen fit to have used them in the common law Court.

PER CURIAM, MASON, CHIEF JUSTICE.— This was emphatically a bill of discovery, praying for an injunction, but asking no relief. It sets forth that William Stevens & Co. being indebted to the complainant, executed to him their promissory note for the sum of one hundred dollars; that this note was afterwards negotiated to the Dutchess County Bank; that the makers failing to pay it at maturity, the bank brought suit against the complainant as endorser, and recovered a judgment against him for the full amount of the note, principal and interest, together with the costs of suit; that William Stevens & Co. afterwards paid off that judgment and procured a transfer thereof to one Morton Swift, a brother of one of the firm of William Stevens & Co. and that the President, Directors & Co. of the Dutchess county Bank, or the said Morton Swift, in their name, has fraudulently brought suit on. that judgment against the complainant in the District Court of Dubuque county. It alleges the absence of some witnesses, the imbecility of another, and that without the discovery sought, the complainant cannot safely proceed to a trial in the suit at law. It then prays for an injunction to restrain proceedings in that suit. A demurrer to this bill was sustained in the Court below.

It is not denied but that the above facts, if proved, would constitute an available defense at law. The necessity of the discovery sought constitutes the sole ground for

appealing to the equity side of the Court, and upon the sufficiency of that ground the case will turn. Cannot the same proof be had in a Court of law in this case as in a Court of equity? The suit at law was brought in the name of the President, Directors & Co. of the Dutchess County Bank. All other defendants to this bill, therefore, would be competent witnesses in the other Court. Are not these all the witnesses who will be made to testify by virtue of the bill of discovery?

*The President, Directors & Co. of the Dutchess *294
County Bank would not give their answer under oath, and it would not, therefore, be testimony in the case. 1 Maddock's Chancery, 212; Story's Equity, § 1501.

Some officer of the corporation should have been made a defendant, if evidence were sought from that source, inasmuch as the corporation would answer under seal, and could not, in its corporate capacity, take an oath or be prosecuted for perjury. Why, then, should their answer be taken? What would have been gained by this bill? Nothing. We therefore think the demurrer was properly sustained, and the order of the Court below will be affirmed.

Theodore S. Parvin, plaintiff in error v. Joseph J. Hoopes, defendant in error.

Error to Muscatine.

Where judgment is rendered by default on a note, it will be presumed that the Court required proof of the signature unless the record shows to the contrary (*f*).

Where the note is payable at a given time, "with ten per cent interest, if not paid when due," the interest is properly computable from the date of the note.

(*f*) See Wilson v. King, *ante*, page 106, and authorities cited in note (*f*).

Theodore S. Parvin *v.* Joseph J. Hoopes.

Where judgment is given by default on a note for the payment of money only, the Court may direct the clerk to compute the interest and assess the damages, by virtue of the 13th sec. of the practice act.

Action of assumpsit on a note brought by the defendant against the plaintiff in error. The record states that at the November term, 1842, the defendant made default, "and neither of the parties requiring a jury, it is ordered that the clerk assess the damages, which being assessed at one hundred and six dollars," judgment was rendered accordingly.

To reverse the judgment Parvin assigns for error: —

1. That after the defendant was defaulted no jury was called to hear the proof and assess the damages.

2. That after a default no proof of the execution of the instrument was given; the same being at the first term.

3. That judgment was entered on a default without a writ of inquiry.

4. That judgment was given for more than was due on the note.

*295 *Woodward, for plaintiff in error.

Lowe & Deshler, for defendant in error.

Per Curiam, Mason, Chief Justice. — The first point made in the assignment of errors is, that no jury was called to assess the damages after default taken. The action being brought on an instrument of writing for the payment of money, this objection was probably made without a reference to the thirteenth section of the practice act.

The second objection is, that the record contains nothing to show that the signature was proved. The law required such proof in cases like the present, before judgment was rendered. The Court will be presumed to have done right in this respect, until the contrary is shown.

The third objection has been already sufficiently an-

swered. The fourth and last is that judgment was rendered for too much.

The action was brought upon the following note: —

"$100. BLOOMINGTON, Iowa, April 9, 1842.

"Six months after date, I promise to pay J. J. Hoopes, or order, one hundred dollars, with ten per cent interest, if not paid when due.

"(Signed) T. S. PARVIN."

The clerk computed the interest from date, whereas, it is contended that such interest should only have been reckoned from the time the note became due. We think the computation was correct. The note evidently intends to give ten per cent interest from date, if not paid when due. Whether this is not a penalty against which equity would relieve is a very different question from that presented by the case in its present aspect. Judgment affirmed.

JOHN DAUGHERTY, plaintiff in error, *v.* BRIDGMAN & PARTRIDGE, defendants in error.

Error to Washington.

Assenting to a trial upon the pleas, amounts to a waiver of a demurrer on file (*k*).

The record should show that the demurrer was called up for the action of the Court before the omission to dispose of it can be assigned as error.

*This was an action of assumpsit brought by Ar- *296
thur Bridgman and George Partridge, partners, &c.,

(*k*) To the same effect, see Rev. § 2878; Beach *v.* Thompson, 15 Iowa, 333; Morgan *v.* Webster county, *ib.* 395.

against John Daugherty, upon two promissory notes. Judgment for the plaintiffs, November term, 1842, for two hundred and thirty dollars and nineteen cents.

The defendant below is the plaintiff in error.

The facts in the record, and the errors complained of, appear in the opinion of the Court.

HALL, for plaintiff in error.

ROBER, for defendants in error.

PER CURIAM, MASON, CHIEF JESTICE.—We find no regular assignment of errors in this case, but from the brief argument of the plaintiff in error, it appears that the only error complained of is, that the Court should have decided the issue upon the demurrer before they compelled the defendant below to go to trial upon the pleas. Had such been the fact, it would have been error. But we cannot find that the record shows any such thing to have been done. We cannot find that the defendant ever called up his second demurrer. Nor was there any trial upon the pleas; but a judgment was entered by agreement. Even had there been a trial upon the pleas without noticing the demurrer, the defendant could not now complain, unless he objected at the time. Assenting to a trial upon the pleas would have been a waiver of the demurrer.

Judgment affirmed.

BENJAMIN R. PETRIKIN, assignee in bankruptcy of E. M. Bissell, *v.* TIMOTHY DAVIS.

Appeal from Dubuque.

An insolvent debtor, in making an assignment for the benefit of his creditors, is not bound to make a *pro rata*, or equitable division; but may select from among them those whom he will pay to the exclusion of others (*l*).

An insolvent cannot revoke the deed of assignment after the assignee has notified a *portion of the creditors under it, or where *297 any of the trust powers have been executed.

It is not a departure from the trust for the trustee to sell the effects of the insolvent upon credit, under a general direction to dispose of the effects, &c (*m*).

In 1841, Bissell being in embarrassed circumstances, made an assignment of his effects for the benefit of certain of his creditors, constituting Timothy Davis his assignee. In 1842 Bissell took the benefit of the general bankrupt law, and Petrikin was appointed the assignee in bankruptcy, who filed his bill against Davis, the assignee in fact, to set aside the trust, and subject the property of Bissell so assigned to a general distribution under the bankrupt law, alleging that the assignment was void, —

1. Because actual possession was not taken of the property at any time before the bankrupt law operated.

2. Because the deeds of assignment were not recorded in accordance with the provisions of the statute.

3. Because there was no schedule of the property

(*l*) Under the Revision, such assignment must be for the benefit of *all* the creditors in proportion to the amount of their respective claims, § 1826; Williams *v.* Gatrell, 4 Gr. 287; Burrows *v.* Lehndorf, 8 Iowa, 96; Savery *v.* Spaulding, *ib.* 239; Bebb *v.* Preston, 1 Iowa, 460; Loving *v.* Pairo *et al.* 10 Iowa, 282; Cole *v.* Dealham, 13 Iowa, 551; Graves & Co. *v.* Alden, *ib.* 573.

(*m*) Savery *v.* Spalding, 8 Iowa, 239.

made out and attached to the assignment, prior to the operation of the bankrupt law.

4. Because the assignment was for a part only of the creditors of the assignor.

5. Because said assignment was made ostensibly for the benefit of the creditors, generally.

The cause was heard upon the bill and answer at November term, 1842, and a decree rendered in favor of the defendant, Davis, from which the complainant appealed to this Court.

All the other facts relative to the points relied upon for a reversal of the decree are embodied in the opinion of the Court.

A. Thomas, for appellant.

T. Davis, in *propria personæ.*

Per Curiam, Mason, Chief Justice. — It is a matter of considerable importance to determine, in the first place, what proceedings actually took place in this cause in the Court below. The defendant states that the cause was brought to a hearing on petition and answer, and, therefore, under our statute, the answer is to be taken as true on all points. The complainant does not controvert this statement directly, but insists that the case was heard on petition and answer, *with accompanying testimony;* that this testimony was parol, and inasmuch as it has not been transmitted to this Court, the case must be sent back for a new trial.

*298 *The transcript of the record contains no replication, but states, in one entry, that "The Court being sufficiently advised concerning the matters and things contained in the petition and answer in this cause, and *of the testimony given in the case on the trial, do find,*" &c. From this it would certainly appear that evidence was given on the trial, and the natural inference is that it was parol evidence.

The Chancery Act, section 18, provides that "If the plaintiff do not file his replication or exceptions within the time fixed by the rules of the Court aforesaid, the cause shall stand for a hearing on petition and answer." Section 28 of the same act reads as follows: "If the complainant proceeds to a hearing on petition and answer only, the answer shall be taken to be true on all points, and no evidence shall be received to contradict the same, unless it be matter of record to which the answer refers, and is provable by the said record." I therefore conclude that the cause was brought to a hearing on petition and answer, and that if parol evidence was given at the trial it was illegally given. The cause ought not, therefore, to be sent back on account of the omission to send up illegal testimony, and the answer of the defendant must be taken as true throughout.

The case will then turn upon the validity of the assignment from Bissell to Davis. It is said that only one of these deeds has ever been recorded. I find no evidence to support this assertion, but, even if true, it seems to me immaterial. An actual transfer of the personal property seems to have taken place, sufficient to dispense with the necessity of recording the deed of assignment. Nor was the recording of the deed more material in respect to the real estate so far as this case is concerned. The law vested in the complainant in this case only the property possessed by Bissell at the time of filing his petition in bankruptcy. That which he had previously sold was not his, and although the law would have protected a subsequent purchaser for a valuable consideration, this principle does not extend to liens and transfers created by operation of law. Had the assignee in bankruptcy taken possession of and sold the real estate to some person unacquainted with the conveyance to Davis, and before the deed of the latter had been recorded, the purchaser, under such a sale, would have held the property. The case is parallel to that of a judg-

ment lien which would not take priority of a previous unrecorded deed, though a *bona fide* sale under such a judgment would have done so.

Similar remarks are applicable to the objection that no schedule accompanies the assignment. I see no evi-
*299 dence in the fact, and even if true, *the absence of this would only be a circumstance going to show that the transaction had not been *bona fide*. Such a conclusion being rebutted by the answer, the absence of the schedule becomes unimportant.

The point is made in the argument as to whether an assignment by an insolvent is valid when made to give preferences to a portion of the creditors. Such is, doubtless, the case. 2d Kent's Com. 532; 2d Story's Com. 302. An insolvent may legally prefer one or more of his creditors. Unable to perform his engagements to all (in the absence of a bankrupt law), he is permitted to select from among his creditors — all equally meritorious — those whom he will pay, to the exclusion of the others. The assignment in this case was made not only before the bankrupt law took effect, but before its passage, and could not, therefore, be affected by it.

It is further contended that the assignment is void, because made ostensibly for the benefit of the creditors generally, but in fact for only a portion thereof. The assignment purports to be made "in trust for the benefit of the creditors of the said Elijah M. Bissell, in manner herein mentioned." This is certainly not "for the benefit of the creditors generally," but is qualified by the subsequent provisions of the assignment.

Another question arises out of the fact that many of those for whose benefit the assignment was made had not manifested their assent thereto prior to the filing of Bissell's bankrupt petition. Some have not yet done so. A portion of the number had, however, assented to the assignment in time. As to them, at least, it will be valid;

and when, instead of endeavoring to set aside the whole transaction as fraudulent, the assignee contests the rights of particular individuals under the assignment, a very different question from the present will present itself.

But it is said the consideration money expressed in the assignment is wholly inadequate. Had the assignment been to Davis for his own benefit, the objection would have had weight. But he is the mere instrument in the transaction, the medium through which the interest passes from Bissell to his creditors. The actual consideration for these assignments was the debts due to those in whose favor these assignments were made. There is nothing to show the inadequacy of the consideration.

It is further urged that Bissell has revoked the power conferred on Davis. Had this been a mere naked power, he would clearly have had the right of revocation, which he afterwards undoubtedly attempted to *ex- *300 ercise. But the instrument in this case was assignment of property through Davis, not the mere conferring of a naked power upon him. Before Davis had in any way notified the persons for whose benefit the assignment had been made, it might have been revoked; but after such notification, after several of the number had not only manifested their assent, but even signed the deed of assignment, after the trust is to a considerable extent executed, the right of revocation has certainly passed away from Bissell.

It is also objected that Davis, the assignee, has departed from the power conferred upon him by selling a portion of the property on credit instead of for ready cash. If this were a deviation from his duty, it would hardly invalidate the assignment. The parties really interested in the matter ought not to be prejudiced by an act of this nature, performed by the assignee selected by Bissell himself. But the assignee was not bound to sell for ready cash. He was only required to convert the property into money with-

in such convenient time as to him should seem meet. I see in this no prohibition to his selling on a reasonable credit.

Much stress is laid in the argument upon the fact that the assignment was made for the purpose of delaying a creditor by preventing the levying of an attachment. The only answer which I think can successfully be made to this objection is that no evidence of the fact itself can be found in the papers of the case.

There are a few other points of minor consequence raised in the very elaborate argument of the counsel for the appellant. I deem it hardly necessary to reply to them all, as I see nothing in them which I think should cause a reversal of the decision below. I therefore think the decree of the District Court in this case should be affirmed.

JOHN SMITH, plaintiff in error, *v.* SMITH and JOHNSON, defendants in error.

Error to Johnson.

Where the parties in action of assumpsit waive a trial by jury, and submit the whole matter to the Court, no formal entry of a finding on the issues as on the verdict of a jury is necessary. The amount of damages found is within its own knowledge, and it is sufficient to enter up judgment for the amount of damages assessed (*n*).

*301 *This was an action of assumpsit brought by Adam Smith and Chesley Johnson, for the use of William Harris, against John Smith, upon a note for $123, to which the defendant pleaded the general issue, and gave notice of special matter of defense.

(*n*) The provisions of the Revision are to the same substantial effect. See §§ 3067, 3068.

John Smith v. Smith and Johnson.

At the January term, 1843, the case was submitted to the Court, and a judgment awarded the plaintiffs for $36.98 damages. There were motions in arrest of judgment, and for a new trial, overruled. To reverse which the defendant below brought up the case upon a writ of error.

The following errors are assigned:—

1. The judgment was given in favor of said plaintiffs, when, by law, it ought to have been in favor of said defendants.

2. The Court ought to have sustained said motion in arrest, and granted a new trial.

3. There was no finding by a jury or Court on the issues joined, upon which to render judgment.

4. The record aforesaid shows no finding upon which judgment could be rendered.

Bates & Harrison, for plaintiff in error.

Reagan & Gilbert, for defendants in error.

Per Curiam, Mason, Chief Justice. — The first two errors assigned in this case are not founded upon matter of record, and, therefore, cannot now be considered. The third and fourth are identical in substance: that no verdict was rendered to serve as a basis for the judgment. The right of a jury was waived by the parties at the trial, and the whole cause submitted to the Court. Without any formal entry of a verdict, the record merely states as follows: "And being advised in the premises, it is considered by the Court that the said plaintiffs recover of the said defendant the sum of thirty-six dollars and ninety-eight cents damages assessed by the Court," &c.

The entry is abundantly sufficient. Where the jury find a verdict, their finding should be substantially set forth on the record, for it forms the basis of the judgment. Without this, we cannot know whether the Court entered up the proper judgment. The Court has no power of knowing

the proper amount but by means of the verdict. But where the whole matter is left to the Court the case is different. The amount of damages found is within its own knowledge, and there is, therefore, not that necessity for entering up a formal verdict that exists in the other case.

It is sufficient to enter up the judgment at once, stat-
*302 ing it to be *for the amount of damages assessed in the case, as was done in the present instance.

Judgment affirmed.

THE UNITED STATES, plaintiff in error. *v.* HENRY E. SWITZER, defendant in error.

Error to Cedar.

Where the public prosecutor entered a *nolle prosequi* on an indictment for burglary, it was held that the county was liable for the costs of prosecution.

At the District Court held in and for the county of Johnson, while the county of Linn was attached for judicial purposes; towit: At May term, 1840, Henry Switzer, Lester Wallace, and William Long were indicted for burglary. The case was afterwards transferred to Linn, and the venue, as to the defendant Switzer, changed to the county of Cedar, and was disposed of at the May term of the Cedar District Court, 1842, by the district prosecutor entering a *nolle prosequi.* A judgment was thereupon rendered against the county of Linn for the payment of the costs.

The county of Linn, in the name of the United States, prosecuted a writ of error.

Error assigned: —

The Court erred in rendering a judgment against the county of Linn for costs.

Robert Lucas *v.* George B. Waller.

BATES, for plaintiff in error.

PER CURIAM, MASON, CHIEF JUSTICE. — The only question involved in this case is whether the county is liable to pay the costs of the prosecution in cases where a *nolle prosequi* has been entered by the public prosecutor. It was undoubtedly in the power of the District Court to direct the costs to be thus paid, prior to the act of February 15th, 1842. The sixth section of that act declares that "No costs shall be rendered by the Court in the event of the acquittal of a person charged with a criminal offense against the private prosecutor, unless the Court is satisfied that the prosecution is malicious, or the county or the territory *except," &c. This section makes *303 no change in the previous law, except in the event of an "acquittal." The entering of a *nolle prosequi* is not an acquittal, and, therefore, the Court was justified in entering up a judgment for costs against the county.

Judgment affirmed.

ROBERT LUCAS, plaintiff in error, *v.* GEORGE B. WALLER, defendant in error.

Error to Muscatine.

If a copy of a summons is left at a house which is not the defendant's residence, and a judgment be taken against him by default, he must either set aside the default by an affidavit of merits, and such other showing as the law requires, or he must seek his remedy in a Court of equity (*o*).

(*o*) Judgment by default may be set aside on motion or petition in the same Court. Rev. ch. 123, title "Default"; and § 3545; see also Pigman *v.* Denny *et al.* 12 Iowa, 396; McKinley *v.* Bechtel *et al. ib.* 561; Downing *v.* Harmon, 18 Iowa, 535; Berryhill *v.* Jacobs, 19 Iowa, 346; Same *v.* Same, 20 Iowa, 246.

Robert Lucas *v.* George B. Waller.

This was an action of assumpsit, brought by George B. Waller against Robert Lucas, upon a note of which the following is a copy: —

"For value received, I promise to pay John G. Deshler, or order, eighty-one dollars by the tenth day of July next.

"ROBERT LUCAS.

"Bloomington, May 5, 1841."

Endorsed, "J. G. Deshler."

At the appearance term, 1842, the sheriff returned "Served this writ by leaving a copy of this writ at the house of Charles Nealley, the usual place of residence of the within named Robert Lucas, in the care of Charles Nealley, informing him of its contents, on the tenth day of November, A. D. 1842. Returned November 17th, 1842."

A motion was made by Parvin, attorney for the defendant, for a continuance, for that the defendant had not legal service, the copy of the summons being left at the residence of Charles Nealley, some miles in the country, while the defendant made his residence in the town of Bloomington; which motion was overruled.

Judgment was afterwards rendered by default for $87.53 damages and costs.

*304 *The defendant moved to set aside the judgment and continue the same, because there had been no legal service, and that he should be permitted to show that the dwelling of Charles Nealley was not the usual place of abode of the defendant. Overruled.

To reverse this judgment the defendant removed the cause by writ of error to this Court.

Errors assigned: —

1. That the Court refused to continue the above cause, there being no legal service.

2. That the Court refused to permit the defendant to show that the dwelling of Charles Nealley was not the usual place of abode of the defendant.

3. That after the defendant was defaulted, no jury was called to hear the proof and assess the damages.

4. That after a default, the Court, or the clerk, and not a jury, took the proof and assessed the damages, the same being at the first term.

5. That judgment was entered on a default, without a writ of enquiry.

6. That judgment was given for the plaintiff, and not for the defendant.

PARVIN & WOODWARD, for plaintiff in error.

LOWE & DESHLER, for defendant in error.

PER CURIAM, MASON, CHIEF JUSTICE. — The service in this case seems to have been legal, under the act of December 31, 1840. The defendant below, however, offered to show that the house of Nealley was not his usual place of abode, and thus contradict the sheriff's return, but the defendant below was out of Court. He had suffered a default, and before he could take any steps in the matter, he must get the default set aside by an affidavit of merits, and such other showing as the law requires.

If Nealley's house was not really the usual place of abode of the defendant below, and if he was really ignorant of the commencement of the suit, and if the judgment entered up against him is actually unjust, he had a remedy in equity, but has no ground of complaint against the ruling of the District Court.

The other points raised are sufficiently answered in the case of Parvin *v.* Hoopes, decided at the present term of this Court.

Judgment affirmed.

*305 *Wm. G. Knight, plaintiff in error, *v.* Henry Fox, defendant in error.

Error to Scott.

It is not necessary to set out the stamps or devices on bills, as part of the description in the declaration, or in the copy appended; and an omission to do so will not prevent the plaintiff from sending the originals to the jury (*p*).

Bills of exchange may be given in evidence under the common counts, where there is a privity of contract, as by the payee against the maker, or the endorsee against the endorser (*q*).

Although as a geneal rule the proof should correspond with the allegations, still, the plaintiff is not bound to prove the demand and notice averred, where they have been previously waived by the defendant (*r*).

A general guaranty that it shall not be necessary to demand payment and give notice on bills or notes endorsed by the guarantor, is in force until shown by him to be rescinded.

Endorsement in blank, as between a first and second endorser, is tantamount to a pecial endorsement from the first to the second, and may be so filled up (*s*).

This was an action of assumpsit, brought in the Scott county District Court by Henry Fox, against William G. Knight, as the second endorsee of ninety-one bills of exchange.

The declaration contained ninety-one special counts, each one averring the making of the bill, the endorsement by the payee to the defendant, and by him to the plaintiff. Also, an averment of presentment for payment; refusal to

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(*p*) See Smith *v.* Ralston, *ante*, p. 87, note; Merritt *v.* Woodbury & Dawley, 14 Iowa, 209; First National Bank of Iowa City *v.* Ryerson, 23 Iowa, 508.

(*q*) Not so under our present practice.

(*r*) Abbott *v.* Striblen, 6 Iowa, 191.

(*s*) Twogood & Co. *v.* Coopers & Clark, 9 Iowa, 415; Harrison *v.* McKim, 18 Iowa, 485.

pay and notice to the defendant of the dishonor. The declaration also contained the common counts.

Plea, non-assumpsit.

On the trial, the plaintiff abandoned all but the first twenty-nine counts, and the common counts.

The plaintiff then produced twenty-nine bills of exchange, and after proving the handwriting of the defendant as endorser, produced the letter copied into the bill of exceptions, and proved it to be in the handwriting of the defendant, and then offered to read them to the jury. The defendant objected to the admission of the bills for the reasons set forth in the bill of exceptions, and in the assignment of errors. The objections were overruled and a verdict and judgment for the plaintiff was had at the April term, 1843, for the sum of ten thousand three hundred and seventy-seven dollars and eighty-four cents. To reverse *this judgment Knight, the defendant below, *306 has brought the case here upon a writ of error, and assigns for error.

1. The Court below erred in permitting the bills to be read in evidence to the jury, because there was a variance between the bills offered and those copied in the declaration. The variance being in this; in the bills offered in evidence there was a stamp with a crown, and the words three shillings and sixpence printed in the stamp, and in the copies attached to the declaration there is no stamp.

2. There was no proof of demand and notice.

3. The Court erred in permitting the guaranty, copied in the bill of exceptions, to be offered in evidence, and to go before the jury. Because no copy of it was furnished and attached to the declaration, of an excuse for not giving notice, because, if the guaranty could be admitted at all under the declaration, it could not be until there was proof to show that the bills offered in evidence were received by Fox, under and in compliance with said guaranty.

The substance of the guaranty from Knight to Fox, is embodied in the opinion of the Court.

MITCHELL & GRANT, for plaintiff in error, cited the following authorities in support of the errors assigned:—

2 Starkie, 161, note; Bayley on Bills, 302; 3 Barnwell & Adolphus, 619; Cory *v.* Scott, 12 East. 171; Harris *v.* Richardson, 4 Car. & P. 522; Hill *v.* Vannill, 3 Greenleaf, 233; Frazier *v.* Harvie, 2 Littell, 186; Bayley on Bills, 447.

LOWE, LEARNED & COOK, for defendant in error, cited the following authorities as opposed to the errors assigned:—

1 Blackford's Rep. 59; 1 Scammon Rep. 388; 2 Starkie, 769; Chitty on Bills, 524; 1 Cowper, 341; 1 Johnson's Rep. 94; 2 Starkie, 167, note (1); 2 Conn. Rep. 478; 3 Cowen's Rep. 262; 5 Pickering's R. 436; 4 do. 525; 3 John. Rep. 68; 2 Johns. Rep. 278; 2 Wheaton, 75; 3 Cranch, 492, &c.

PER CURIAM, MASON, CHIEF JUSTICE.—The first point made by the plaintiff in error in this case, is that the Court below erred in permitting the bills to be read in evidence to the jury on account of a variance, that variance consisting in this: In the bills offered in evidence there was a stamp with a crown, and the words three shillings and six pence printed in the stamp, and in the copies attached to the declaration there is no stamp.

*307 *Our statute requires a copy of the instrument sued on to be appended to the declaration. The originals, when produced in evidence, must correspond, substantially, with these copies. It would be error to admit originals differing essentially from such copies.

But this correspondence need extend no further than to matters appertaining to the instrument, and making part

thereof. Any blemish or private mark found thereon, and constituting no part either of the face or of the endorsement of the instrument, need not be exhibited in the copy. Notes and bills are are often found struck off in the form of bank bills and other fanciful shapes, with ornaments at the head, and frequently all around the margin. These ornaments would not need to be exhibited in giving copies of the instruments.

We have nothing to show that the stamps in question were any more essential to the validity of the bills than are the various ornaments which abound so much on bank notes, or printed bills of exchange. There was, therefore, no greater necessity of setting them forth in the copies. To render the objection we are now considering available, two things should have been made to appear in evidence: first, that the bills were executed in England; and secondly, that by the laws of that country the stamp was essential to the validity of such instruments. Now, we cannot judicially know that there is but one London in the world, and that this city is to be found in England, any more than we can take cognizance of the English law in relation to stamps. No valid objection can, therefore, be raised to the decision of the District Court, on the point we have now been considering.

The second error assigned is that there was no proof of demand and notice. In reply to this the plaintiff below sets up a waiver of such demand and notice. Does the proof of waiver of notice sustain a declaration in which a demand and notice are alleged? Although the general and reasonable rule is that the proof should correspond with the allegation, still there are high authorities for a deviation from this rule on the subject we are now considering. 3 Cowen, 262; 5 Pickering, 436; 3 Johnson, 68; and other authorities cited by defendant in error.

But whatever may be the proper rule on this subject, there can be no doubt but that the bills of exchange may

be given in evidence under the common counts. The case of King *v.* Wall, decided at the last term of this Court, and the authorities on which that decision was made, even went so far as to authorize a promissory note to be given in evidence under the common counts in an action brought by the endorsee against the maker. Such a rule has
*308 long been followed in a suit brought by *the payee against the maker, and the argument in favor of that course is just as strong where the suit is brought by the endorsee against the endorser. These parties are in privity, the endorsement being, by operation of law, made equivalent to a special agreement of the endorser that he will pay the note himself, unless paid at maturity by the maker. The law presumes that the endorser has received the full value of the note from the endorsee, with a stipulation to restore the same with interest, if not paid by the maker. This amount can consequently be recovered under the common counts.

It is further objected by the plaintiff in error, that the Court ought not to have permitted the guaranty copied into the bill of exceptions to go to the jury, because no copy thereof was attached to the declaration. The statute only renders it necessary for the plaintiff to append to the declaration a copy of the instrument on which the suit is brought. It is not necessary in this manner to set forth his evidence. The guaranty in this case was mere evidence, not the instrument on which the suit was brought.

The last objection it will be necessary to notice, is that the plaintiff should have shown that the bills offered in evidence were received by Fox under and in compliance with said guaranty. The language of that guaranty is very comprehensive —"I hereby agree that it shall not be necessary for you to present for payment at the maturity thereof any bills of exchange or promissory notes which now are in or which may at any time hereafter come into your hands *endorsed by me*, it being understood and agreed

that I shall be liable to you for the payment of, and shall pay you all and every bill of exchange and promissory note, endorsed by me, notwithstanding the same may not have been presented for the payment thereof; and further, that it shall not be necessary for you to give me notice of the dishonor of such bills of exchange, any or either of them."

This guaranty embraced all bills that then were in, or should thereafter come into the hands of Fox, endorsed by Knight. How long is this guaranty to be considered in force? Until it is shown to have been rescinded, the burden of proof for which purpose is thrown upon Knight.

The bills offered in evidence in this case were endorsed by Knight, and came into the hands of Fox. Nay, the endorsements in blank are as against Knight, tantamount to a special endorsement to Fox, for there is authority contained in a blank endorsement which allows the endorsee to fill up the endorsement by making it, if he choose, a special *endorsement to himself. The bills in the *309 present case come clearly within the rule laid down in the guaranty, and were, therefore, properly admitted in evidence on the trial.

Judgment affirmed.

JOAB BERNARD and OVERTON BERNARD, plaintiffs in error, *v.* JOHN A. PARVIN, defendant in error.

Error to Muscatine.

Under the territorial statute, in suits brought upon any instrument of writing, made payable to a firm name, it is only necessary to set out and prove the partnership name.

This was an action of assumpsit brought by the plaintiffs against the defendant in error, upon a note, of which the following is a copy: —

"BLOOMINGTON, September 1, 1842.

"$317.81.

"One day after date, for value received, I promise to pay John A. Parvin, or order, three hundred and seventeen dollars and eighty-one cents, with interest at the rate of ten per cent per annum.

"WM. BROWNELL."

"Endorsement: —

"November the 21st, 1842. I transfer the within note to J. & O. Bernard, with full recourse upon me.

"JOHN A. PARVIN."

The note was declared upon in the usual form, with,—

1. A special count upon the note,
2. For money had and received.
3. For goods sold and delivered.

The defendant pleaded the general issue to the whole of the counts. Second, the general issue to the second and third counts, and demurred specially to the first, for that the declaration did not allege any demand upon the maker, nor any notice of non-payment to the endorser. This demurrer was afterwards withdrawn, and the case submitted to a jury at October term, 1843, and a verdict for the defendant.

*310 *On the trial the Court charged the jury that it was incumbent upon the plaintiff, in order to his recovery, to prove that J. & O. Bernard was a firm composed of Joab Bernard and Overton Bernard, to which the plaintiffs excepted.

This is the error of which the plaintiffs complain.

WHICHER, for plaintiffs in error.

WOODWARD, for defendant in error.

PER CURIAM, MASON, CHIEF JUSTICE.—The commencement of the declaration in this case reads as follows: —

"Joab Bernard and Overton Bernard, merchants, trading under the name and style of J. & O. Bernard, complain, &c."

Elias P. Chord *v.* George McCoy.

The suit is brought against the defendant as endorser of a promissory note, which endorsement is in the words following: —

"November the 21st, 1842. I transfer the within note to J. & O. Bernard, with full recourse upon me.

(Signed) "JOHN A. PARVIN."

On the trial below, the Court charged the jury that it was incumbent upon the plaintiffs to prove that the firm of J. & O. Bernard is composed of Joab Bernard and Overton Bernard. This is assigned for error, and raises the only question presented by the case.

We think the Court erred in giving the instruction. The statute declares that in all suits brought upon any instrument of writing, made payable to partners trading together under their partnership name and style, it shall only be necessary to prove the partnership name and style, without proving the names of the individuals who compose the same. No direction is given as to the shape of the commencement declaration, and although it would probably be as well to sue in the partnership name, merely; still, as the statute makes no exceptions to the sweeping rule it has prescribed, we do not feel justified in making any.

The judgment below will, therefore, be set aside and a new trial ordered.

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*Elias P. Chord, plaintiff in error, *v.* George *311 McCoy, defendant in error.

Error to Cedar.

The sheriff is the proper officer to receive and execute process in all cases, unless there is an affidavit of partiality, prejudice, consanguinity, or interest existing in him or his deputy (*t*).

(*t*) See Rev. ch. 26, title "Sheriff," and ch. 27, title "Coroner."

Elias P. Chord *v.* George McCoy.

If a coroner execute process without such affidavit having been previously filed, the service is void.

This was an action of trespass *vi et armis*, instituted by Chord against McCoy, in the District Court of Cedar county, and the writ directed to the coroner.

The suit was dismissed on the defendant's motion, on the ground that there had been no affidavit filed as required by the statute, so as to authorize the coroner to serve the summons, instead of the sheriff.

Judgment was rendered against the plaintiff for costs, at the special term in August, 1841, which judgment is now sought to be reversed, because the Court below erred in sustaining the motion to dismiss, &c.

HASTINGS, for plaintiff in error.

WHICHER, for defendant in error.

PER CURIAM, MASON, CHIEF JUSTICE. — The question we are called upon to decide in the present case is whether it is regular for the clerk to issue a summons and direct it to the coroner, in any case, unless where an affidavit of the interestedness of the sheriff has been first filed. We think it is not. The third section of the act relative to coroners and their duties (Laws of 1839–40, page 11) makes it the duty of the clerk to issue and direct process to the coroner, in all cases, upon an affidavit of the partiality, prejudice, consanguinity, or interest of the sheriff or his deputy being made and filed in his office. Unless such affidavit be first made and filed, the sheriff is the proper officer to whom process of this kind should be directed.

It may be thought a matter of small import whether a ministerial duty of this kind be performed by the sheriff or coroner, but the law seems to regard it as material. *312 If it will not permit the sheriff to serve *a summons where either he himself or his deputy are akin to the defendant, it cannot be regarded as unimportant whether he or some other person serve a process in an

ordinary case. The service and return by the coroner are of no more validity than though made by any other person, unless in the cases provided for by law, and it can only be known in the mode pointed out by statute when such a case is presented.

But it is said that the Courts will take notice of their own officers, and that the Distric Court, without proof, ought to have recognized McCoy as its sheriff. What evidence have we, even at this time, that McCoy is sheriff of Cedar county? If the District Court should have taken notice of this fact without proof, must the Supreme Court do so likewise? Admitting the position assumed by counsel to be correct, it was incumbent on them by bill of exceptions to have placed the matter properly before the Supreme Court. We see nothing upon the record from which such an inference can be legitimately drawn.

Judgment affirmed.

William Wilson, plaintiff in error, *v.* Joseph Webster, defendant in error.

Error to Lee.

A note executed in consideration of a quit claim to certain lots of land, the title to which is in the United States, but containing improvements upon any one of them, in the rightful claim or ownership of the vendor, is collectible without any proportionate deduction for the value of those lots which contain no improvements.

Where a purchaser obtains all that he bargained for, in the absence of all fraud or illegality in the transaction, and receives the benefit designed to be transferred, he cannot set up against the vendor a want or failure of consideration (*u*).

(*u*) See Hill *v.* Smith, *ante*, p. 70; Freeman *v.* Holliday, *ante*, p. 80; Starr & Burgess *v.* Wilson, *post*, p. 438; Pierson *v.* David *et al.* 1 Iowa, 28; Spry *v.* Sleppy, 15 Iowa, 409.

William Wilson *v.* Joseph Webster.

This was an action of assumpsit instituted by Joseph Webster against William Wilson, in the District Court of Lee county, upon a note, of which the following is a copy: —

"FORT MADISON, Sept. 25, 1830.

"$1,000.25.

Two years after date, I promise to pay to the order of Joseph Webster ten hundred and twenty-five dollars, for value received, without defalcation or discount.

"WILLIAM WILSON.

"Attest: JAMES DOUGLASS."

*313 *The declaration contained but one count; to which there was a special demurrer, but which the record does not show was called up.

The parties went to trial upon the general issue, and a notice by the defendant that the note was executed without any consideration, and that if there was any consideration it had wholly failed.

A verdict and judgment was rendered for the plaintiff for the sum of $1,089.06 damages, together with costs.

On the trial the defendant offered evidence to prove that the note on which suit was brought, together with another note of the same amount, which other note was paid before the commencement of this suit, were given for eleven town lots in the town of Fort Madison, at that time in the county of Des Moines, and territory of Wisconsin, now the territory of Iowa; and which said lots at the time of said sale, were conveyed by deed of quit-claim from plaintiff to defendant; that at the time of such sale and conveyance the fee simple title to said lots was in the government of the United States, and continued so to be at the time of trial; that there were, at the time of said sale and conveyance, improvements on four of said lots; that the four lots on which said improvements were made were, at the time of such sale and conveyance, estimated to be worth eight hundred dollars. By plaintiff ov-

idence was offered to prove that prior to such sale he was in possession of said four lots, by inclosure, and the residue was held and claimed by him, not by the inclosure, but in accordance with the custom of the settlers in said town of Fort Madison; that he was recognized by the citizens of said town and others, as entitled to the possession of the same; that, at the time of sale aforesaid, he transferred his possession to defendant, who subsequently sold one of said lots, and received for all of said lots certificates of pre-emption from the commissioners appointed under an act of congress, approved July 2, 1836, entitled An Act for laying off the towns of Fort Madison and Burlington, in the county of Des Moines, and the towns of Bellevue, Dubuque, and Pine, in the county of Dubuque, &c., and the act amendatory, approved December 3, 1837. The plaintiff also gave in evidence a law of the territory of Wisconsin, approved December 3, 1836, entitled "An Act to provide for the collection of demands growing out of contracts for sale of improvements on public lands."

Whereupon the defendant, by his counsel, H. T. Reid, asked of the Court the following instructions to the jury: —

1. That if they were satisfied that the promissory note on which this suit was brought was given for lots of land, which, at the time of its *execution, belonged *314 to the government of the United States, they were bound to find a verdict for the defendant, as there was no consideration.

2. That if there was any consideration, it was illegal.

3. That if they were satisfied that the said note was given for improvements on lands belonging to the government of the United States, at the time of its execution, they were bound to find a verdict for the defendant on the ground that there was no consideration.

4. That if such improvements constituted any consideration, such consideration was wholly void.

5. That if the jury were satisfied that there were im-

provements on a part only of the lots so sold and conveyed, they were bound to find a verdict for the plaintiff only for the proportionate value of the lots, on which there were improvements at the time of the execution of the said note.

6. That if they were satisfied that said lots were not in the possession of said plaintiff, by inclosure, at the time of the sale of said lots, they were bound to find a verdict for the defendant.

The first instruction the Court refused to give in express terms; and charged that if there were improvements on the land, although it belonged to the United States, they would constitute a good consideration.

The fifth instruction was refused to be given in express terms by the Court; and the jury charged that if the lots constituted one tract, an improvement on one might enure to the benefit of the rest, but otherwise if the lots constituted separate and independent tracts.

The second, third, fourth, and sixth instructions were also refused to be given. To all of which refusal and instructions the defendant excepted. And these constitute the errors assigned by Wilson, plaintiff in error, in this Court.

Reid & Johnson, for plaintiff in error, cited in support of the first assignment, act of congress, 1807, vol. 1, Land Laws, &c. 156; 1 Blackford's Rep. page ——; 6 Missouri Rep. 853; Organic Law, page 34, § 6, Iowa Stat. Of the second, Chitty on Con. 539, 536, 538, and 540. Of the third, Chitty on Con. 536, 538.

Henry W Starr, for defendant in error.

Per Curiam, Mason, Chief Justice.—The only exception taken to the proceedings below by the plaintiff in error is in relation to the instructions of the Court to the jury. Six several instructions were asked by the counsel

for the plaintiff in error and refused, either wholly or in *part. All these, except the fifth, are of two *315 classes. First, those calling for a decision that the sale of improvements on the public lands was an insufficient consideration for a promise; second, that it was an illegal consideration, and that the law in neither case would compel the payment of a note given therefor.

Both these points have been frequently decided by this Court, and the ruling of the Court below was in perfect accordance with those decisions. Freeman *v.* Holliday, Hill *v.* Smith, and Stannard and others *v.* McCarty. The only question we need to consider, therefore, is that raised by the fifth instruction asked, and the charge of the Court thereupon. That instruction was as follows: "That if the jury were satisfied that there were improvements on a part only of the lots so sold and conveyed, they were bound to find a verdict for the plaintiff only for the proportionate value of the lots on which there were improvements at the time of the execution of said note." The Court refused to give this instruction in the precise terms in which it was asked, but charged the jury that if the lots constituted one tract, an improvement on one might enure to the benefit of all, but otherwise if the lots constituted separate and independent tracts. The last branch of this charge is in accordance with the instruction asked. The plaintiff in error could not, therefore, except to it, so that it need not now be considered.

By the first branch of the charge we understand the Court to have ruled that, where a person is in possession of one entire tract of public lands having an improvement on a portion thereof, a quit-claim deed for the whole constitutes a good and valuable consideration for a promise, and a note given therefor can be collected in full. We think that instruction was clearly correct. We go further, and say that the same would have been the result had the quit-claim deed embraced other distinct and independent

tracts, on which there were no improvements, if no deception was practiced upon the purchaser. The rule contended for by the counsel for the defendant in error is a sound one; that where there is no fraud or misrepresentation the consideration is not to be apportioned. Where there is no consideration the contract will not be enforced, but a defendant cannot successfully resist the payment of a promissory note on the ground of inadequacy of consideration. He must be the judge of that matter at the time of making the contract.

Suppose, then, that Wilson had given this note in consideration of a quit-claim deed from Webster for lots, in some of which the latter had an interest, and in others not — there being no fraud or deception practiced, and Wilson all the while understanding the facts pre-
*316 cisely as they *existed. The conveyance of the interest which Webster held would, in that case, constitute the entire consideration of the contract. Wilson, who is presumed to know the law, would understand that a quit-claim to lots in which Webster had no interest conveyed nothing. If, therefore, Webster had no transferable interest in the lots on which there were no improvements — no deception being practiced upon Wilson — the latter will be presumed to have given his note for the lots on which the improvements were located. He cannot now object to the payment of the note because these lots were not worth the amount he has stipulated to pay for them. There is no proof or pretence of any fraud or deception having been practiced upon Wilson in the present case, and he must, therefore, perform his promise in the shape in which it was made.

Judgment affirmed.

JOHN D. BUSH, plaintiff in error, *v.* HENRY ELSON and JOHN ELSON, defendants in error.

Error to Dubuque.

A verdict for less than fifty dollars damages, in an action of replevin, in the District Court, does not determine its jurisdiction of the case (*v*).

The test of jurisdiction is the amount claimed in the plaintiff's declaration, and not the amount found to be due by the verdict of the jury.

The facts of the case are sufficiently stated by defendant's counsel, and in the opinion of the Court.

THOMAS, BERRY & ROGERS, for plaintiff in error.

HEMPSTEAD, for defendants in error.

The Court will observe that this is an action of replevin, or an action of *tort*. The sum demanded, and not the amount recovered, is the subject which gives the District Court jurisdiction in all actions of *tort*. 3 Dallas Reports, U. S. S. C. 401; 1 Condensed U. S. Reports, 185.

In this action, it will be seen, that the amount of property specified in the declaration is sixty dollars, and the damages for the taking of the same are laid at seventy-five dollars, clearly bringing this suit within *the *317 jurisdiction of the District Court. And the Court having once taken jurisdiction in this case, could not be ousted of that jurisdiction by the amount of the verdict recovered.

PER CURIAM, MASON, CHIEF JUSTICE.—The defendants in error brought an action of replevin against the plaintiff in error for two yoke of oxen, and claiming in his declara-

(*v*) See Hall *v.* Biever, *ante*, p. 113, and cases cited in note (*s*): see also *post*, 404, 498, and Stone *v.* Murphy, 2 Iowa, 35.

tion damages to the amount of sixty dollars. The jury brought in a verdict for the plaintiff below, of thirty-five dollars. A motion was then made to set aside the verdict for want of jurisdiction; the sum recovered being less than fifty dollars. That motion being overruled, the question is brought up for revision here.

The act of 3d February, 1843, gives the District Court jurisdiction where the debt or demand or cause of action shall amount to fifty dollars or upwards. Shall the test of jurisdiction be the amount claimed in the declaration or that found due by the verdict?

We think the question of jurisdiction should be capable of being determined at the beginning, rather than at the termination of the proceedings, and such we presume is the universal practice of Courts under similar statutes. We know of no instance where the question of jurisdiction has been made dependent upon the verdict of the jury, but it is always made capable of ascertainment at some preliminary stage of the proceedings. One jury might assess one amount of damages; another might agree upon a much larger amount. If this case had been sent out of the District Court on account of the verdict being to small, it might at the next trial be sent out of the justice's Court for an equally good reason, because the verdict was too large. This would be a very inconvenient rule. As well for this reason, as for that of such a course being in opposition to the general course of practice in like cases, we think the decision of the Court below should be sustained.

Judgment affirmed accordingly.

*ABSALOM CORNELIUS, plaintiff in error, *v.* *318
WILLIAM M'ILVAINE, defendant in error.

Error to Henry.

Where a defendant stands by and assents to the change of the name of the plaintiff in a suit before a justice of the peace, and the parties subsequently go to trial upon the merits, it is a waiver of the irregularity of the proceedings, and the defendant is estopped from setting the judgment aside on a *certiorari*.

The errors complained of are set forth in the opinion of the Court.

TEAS & WILLIAMS, for plaintiff in error.

PER CURIAM, MASON, CHIEF JUSTICE.— This case came into the District Court by a writ of *certiorari*, to a justice of the peace. The transcript sent up, in obedience to said writ, is regular in all respects. An affidavit of the defendant below being filed, setting forth that on the trial below, Bond & Martin were the plaintiffs, a rule was taken upon the justice, to show cause why he should not amend the the transcript in this particular. To this rule the justice replied, in substance, that it is true the original summons was issued in the name of Bond & Martin; that the notes were assigned by Bond & Martin to M'Ilvaine, before the suit was brought; that on the return day of the summons the agent of said M'Ilvaine moved to have said M'Ilvaine's name substituted, and that the trial proceed. The defendant made no objection; the alteration was made and the defendant went fully into trial. The justice further stated that he considered the substitution above mentioned an amicable arrangement.

The counsel for the defendant below then moved the Court to dismiss the suit for irregularities set forth in the motion. The Court overruled the motion, which constitutes, in substance, the only error alleged in the case.

So far as regards mere formal irregularities, the Superior Courts should look with an indulgent eye upon proceedings before justices of the peace. The substitution of the name of M'Ilvaine for that of Bond & Martin was in the first instance a substantial error, unless done by consent, but it was waived, even if erroneous, by the subsequent act of Cornelius. After the substitution he went
*319 into a full trial on the merits. The subject *matter of the action remained the same, and whether the actual plaintiffs were Bond & Martin or M'Ilvaine, could make no substantial difference with him. He could therefore have sustained no essential injury from the substitution. Not having made objection thereto at the proper time, he is estopped from doing so now.

Judgment affirmed.

NOTE.—In the cases of George Prior v. Wm. M'Ilvaine, and Wesley Prior v. Wm. M'Ilvaine, the same points were raised and decided as in the preceding case.—REPORTER.

COE AND OTHERS, plaintiffs in error, v. HAMILTON, defendant in error.

Error to Johnson.

Where a note is executed by A B & C, jointly, and B sustains the plea of infancy in an action brought against them on the same, jointly, a judgment may be rendered against A & C, without compelling the payee to commence *de novo* (*w*).

The opinion of the Court embodies the facts of the case.

REAGAN & GILBERT, for plaintiffs in error.

(*w*) See Rev. §§ 2841, 3123, 3132, 3126; Eyre v. Cook, 10 Iowa, 536.

BATES, for defendant in error.

PER CURIAM, MASON, CHIEF JUSTICE.— This was an action brought by Hamilton against Joseph and Sylvester Coe, and Pleasant Harris, on the following promissory note :—

"One year after date, we promise to pay Yale Hamilton, administrator of Samuel P. Hamilton, deceased, the sum of two hundred and two dollars, for value received.

(Signed) "JOSEPH COE,
"SYLVESTER COE,
"PLEASANT HARRIS.

"June 5th, 1839."

To the declaration the defendants severed in their pleas. Joseph *Coe and Pleasant Harris pleaded the *320 general issue, Sylvester Coe pleaded, first, the general issue; second, infancy.

On the trial, the counsel for the defendants asked the Court to instruct the jury, "that if from the evidence they believed that said defendant, Sylvester Coe, was not jointly liable, together with the said other defendants upon said note, by reason of his infancy at the time of making said note, upon the issues joined they should find a verdict in favor of all the said defendants." This the Court refused to do, but instructed the jury that if from the evidence they believed said defendant, Sylvester Coe, was not jointly liable, together with the other defendants upon said note, by reason of his infancy at the time of the making thereof, they could find a verdict in his favor and against the other two defendants.

This instruction of the Court was excepted to, and forms the basis of the first objection, which it will be necessary to consider. The ruling of the Court was certainly correct, whatever may be the consequence of finding for one of the defendants, on the plea of infancy, in a case like this.

There seems to have been some misconception of the proper province of a jury. Their duty is to find facts in accordance with the issues joined between the parties. Wherever there is a thing asserted by one of the parties, and denied by the other, the jury ascertain the truth and report it to the Court. Their duties are then discharged, and it is for the Court to consider and determine the legal consequences of their finding. To suppose in the present case that because the jury found for Sylvester Coe, on the plea of infancy, they must find for the other defendants on the general issue, whether they believe that said defendants had undertaken and promised as set forth in the declaration or not, would be to conclude that the law sometimes required an untrue verdict.

But the real question for decision in this case is, whether the ascertained infancy of one of the defendants defeats the plaintiff's action and obliges him to commence anew. There can be no doubt on this subject. The authorities cited by the defendant in error are conclusive on this subject, and go fully to sustain the decision of the Court below. See particularly the case reported in 5th Johns. p. 160.

Judgment affirmed.

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*321 *JOHN C. SLEETH, plaintiff in error, *v.* JOHN H. MURPHY, defendant in error.

Error to Des Moines.

A demurrer to a plea admits the truth of the facts pleaded.
The statute of limitations must be pleaded (*x*).

(*x*) Hayden *v.* Anderson, 17 Iowa, 158.

John C. Sleeth *v.* John H. Murphy.

A demurrer will not lie, although the lapse of a sufficient time between the accruing of the action and the commencement of the suit should appear upon the face of the declaration (*y*).

The matter of defence set forth in a plea is valid and available at the time of pleading the same.

Statutes of limitations apply to the remedy, and changes in such statutes take effect upon antecedent contracts (*z*).

A demurrer will lie to a plea of non-assumpsit within five years, if the legislature has extended the limitations to six years, which is unexpired at the time of the plea pleaded.

This was an action of assumpsit and attachment, brought by John C. Sleeth against John H. Murphy.

The facts are set out in the opinion of the Court.

Grimes & Starr, for plaintiff in error, cited: —

Ballentine on Limitations, 225, 207–8–9–10; 3 Peters, 270; 2 Mason, C. C. R. 151; 2 Peters, Dig. 117; 1 Caines Rep. 402; 3 Johns. Rep. 263; 7 Johns. 477; 2 Cranch, 272.

Rorer, for defendant in error, cited: —

1 Salk. 287; 1 Ld. Ray. 153; 12 Petersdorf, 355; 9 Conn. Rep. 357; 1 Day's Conn. Rep. 245; 4 M'Cord S. C. Rep. 210; 2 Salk. 422; 2 Ld. Ray. 833; 3 Black. Com. 308; 3 Peters. 30.

Per Curiam, Mason, Chief Justice. — The summons in this case was issued May 20th, 1843, and served the same day. On the 23d of June following, a declaration was filed, containing two counts; the first special, the second comprising the common counts. The first alleges the indebtedness to have accrued in March, 1838. The second states that on the first day of June, 1838, the defendant was indebted in the further sum, &c. On the 19th day of

(*y*) The Revision of 1860 prescribes a contrary rule, § 2961; Newfield *v.* Blawn, 16 Iowa, 297.

(*z*) See Phares *v.* Walters, 6 Iowa, 106; Montgomery *v.* Chadwick, 7 Iowa, 114; Wright *v.* Kithler, *ib.* 92.

October 1843, the defendant pleaded the statute of limitations; that he did not undertake and promise, *322 *&c., "at any time within five years next before the commencement of this action." To this plea there was a demurrer, which was overruled, and this overruling of the demurrer is now assigned for error.

The counsel for the plaintiff contend that the Court below in making the decision just referred to erred for two reasons:—

1. The plea was to the whole declaration, and though a good plea to the first count, was bad as to the second, which lays the cause of action on the first of June, 1843, and is for goods sold and delivered.

2. The plea was bad to the first count, inasmuch as there was no limitation of this action to five years at the time of plea pleaded.

The first of the above reasons is wholly unsubstantial. In trying an issue in law, we do not investigate facts. The demurrer admitted the truth of the plea which alleged that the whole cause of action had accrued more than five years prior to the bringing of the suit. The time alleged in the second count of the declaration is not decisive of the true time when the indebtedness arose, and even if it were, that fact would not be available on demurrer.

But the second reason given above we regard as sound and sufficient. The law in force at the time the suit was commenced limited the time within which such actions should be commenced to five years. But the act of the 15th of February, 1843, and which took effect on the 4th of July following, extended such limitation to six years. This law was therefore in force when the plea was pleaded. Which is to govern, the law in force at the time of bringing the suit, or that when the plea was pleaded? The natural conclusion upon reading the statute would indicate that the case would be under control of the former law. The statute in force when this suit was

brought, declares that actions of this kind "shall be commenced within five years next after the cause of action shall have accrued, and not after." This would seem to be a prohibition against commencing such suit after the expiration of five years from the accruing of the cause of action, and consequently a plea setting forth such lapse of time would seem to be sufficient.

But in such a case a demurrer ought to lie to the declaration where the lapse of more than five years should appear from the declaration itself, as is the case in relation to the first count of the declaration in the present instance.

Now, although such would be the natural construction of the language of the statute, we feel controlled in this matter by the decisions of other Courts on like statutes. It has been of late years invariably held that a statute of limitations must be pleaded; that a demurrer will not lie, *although the lapse of a sufficient time be- *323 tween the accruing of the action and the commencement of the suit should appear from the face of the declaration. If, then, a plea be necessary, it seems to us that the matter of defense set forth in such plea must be valid and available at the time of pleading the same.

It has also been held by the highest judicial authority in this country that statutes of limitations applied merely to the remedy, and that changes in such statutes took effect upon antecedent contracts. If such be the case, then all proceedings to enforce the remedy in such cases, which take place after the new law becomes in force, must be in accordance therewith. We think, therefore, the five year limitation pleaded in this case was not, at that time, a sufficient defence, and the demurrer thereto should have been sustained.

Judgment reversed and case remanded.

JOHN FULWIDER *v.* JOSEPH WILFORD, JR.

From Cedar (agreed case of error).

When A sells to B a tract of land, puts him in possession, takes his notes for the money, and reserves the right to affirm or rescind the contract, he caunot bring his writ of right to recover the possession of his lands without surrendering to B his notes, or showing a readiness to place him *in statu quo* (*a*).

This was an action of right, brought by Fulwider against Wilford, in the District Court of Cedar, to recover the possession of the east half of the south-east quarter of section 11, town 79 north, in range 2 west; the west half of the south-west quarter of section 12 in same township and range; the south east-quarter of section 13, in same township and range; and the south-east quarter of section 14, in the same township and range.

The defendant denied the right of demandant to the said lands, and damages for the detention, and prayed a jury, &c.

A trial by jury was waived, and the matter in controversy submitted to the Court. And it was adjudged that the plaintiff was not the owner of, nor had a *324 right to, the immediate possession of the *property described in the plaintiff's declaration, and that the defendant recover his costs, &c.

The case was informally brought to this Court upon the following agreed statement of facts: —

"Writ of right under the statute of 29th December, 1838, commenced 8th February, 1841, and tried May term, 1842, as by the transcript.

"On the trial, which was submitted to the Court on both the facts and the law, the demandant offered in evidence a deed from William Miller to John Fuldwider, con-

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(*a*) Ryncar *v.* Neilin, 3 Gr. 310; Armstong *v.* Pierson, 5 Iowa, 317; see also Page *v.* Cole, 6 Iowa. 153.

veying the lands claimed, dated 9th May, 1840, and recorded 25th July, 1840. A deed from R. B. Barrett by J. A. Barrett to W. Miller, conveying the same lands, dated 28th January, 1840, and recorded February 5, 1840.

"Patents No. 69, 70, 108, and 109, issued to R. F. Barrett. The papers in a former suit of William Miller *v.* Joseph Wilford, Jr., to show notice in Wilford to Miller's claim. This suit was commenced 7th March, 1840, for the same land, before Miller's conveyance to Fulwider, and discontinued before the commencement of the present suit.

"The land for which this suit is brought is the same for which certificates issued to R. F. Barrett, dated 6th November, 1838, and on which the patents here exhibited issued. The respondent, at the time of bringing this suit, was in the occupancy of the land in such capacity as to subject him to this suit, and is still in possession, commencing June, 1837.

"The respondent introduced Wm. R. Whittlesey, who testified that 'at the time a mortgage was given by Wilford to Miiler, the description of the land was taken from the bonds of Barrett. This before the purchase of Miller from Barrett, and he, Miller, saw the bonds.'

"On cross examination: 'The bonds were in my possession some time. I recorded the bonds and mortgage. I am satisfied he saw the bonds. The bonds were recorded before that time. There was some debate about bonds, in which Mr. Miller participated.'

"Charles Ford, who testified: 'I believe Fulwider knew of the bonds of Barrett to Wilford. I read them at Wilford's and he was present in December, 1839, or January, 1840. Not certain whether before or after he bought. Mr. Wilford was making some proposals to sell the land to Fulwider.'

"Four bonds of R. F. Barrett, by G. W. Harrison to J. Wilford, Jr. [title bonds for the lands] admitted under the *agreement*, as to their *execution. Object- *325

ed to by demandant's attorney, in respect to their legal effect.

"Demandant, in reply, introduced the deposition of Lewis McKee (who, in reply to the interrogatory, 'do you know whether Richard F. Barrett, of Illinois, was in the town of Stephenson, in Illinois, on the 12th, 1839, or any day thereafter, and if yea, what are your means of knowledge?' Answered, 'I went to Stephenson, Illinois, on the 12th day of November, 1839, on business with Richard F. Barrett, and found him there. My business was relative to some land I bought from him, in Dubuque, a year previous, and I went to make a payment, which fell due at that time. I saw him receive payment at the same time for other persons. I am about to leave the territory').

"Four parcels of notes given by James Wilford, Jr. to R. F. Barrett (twenty notes), at the time of receiving the bonds, were tendered by the plaintiff's attorney in open Court, on the trial, to the defendant, and refused by him.

"Evidence was introduced by the plaintiff in relation to damages, and by the defendant in relation to improvements, as in the judges notes.

"The trial in March, 1842, is to stand good.

"The Court having taken the same under consideration, ruled the admission of the bonds in evidence and upon the whole case, adjudged that the demandant could not recover.

"The demandant filed his exceptions, marked J [that on the trial of the cause which was submitted to the Court, on both law and fact, the defendant offered in evidence certain bonds given by R. F. Barrett to him for the conveyance of the land claimed by the plaintiff, to the admission of which the plaintiff objected, but the Court admitted them, to which ruling the plaintiff excepted. The Court also ruled that the plaintiff could not recover, to which the plaintiff excepted].

"The agreement marked K was made by the attorneys

at the trial (an agreement to admit certain deeds and papers as genuine).

"This cause is to go to the Supreme Court upon this statement, and the accompanying papers, as referred to without any other form or process required by law, and to stand as though taken up on regular process.

"W. G. WOODWARD, *for plaintiff.*
"R. P. LOWE, *for defendant.*"

PER CURIAM, MASON, CHIEF JUSTICE.— The actual occupancy of the land by Wilford, is notice to all the world of his interest there; Daniels *v. Davison, *326 16 Vesey, 252; 4 Kent, 179. Independent, then, of actual notice to Fulwider, he stands in the place of Barrett, possessing no more rights, and subject to the same liabilities. Barrett and Wilford entered into a contract by which the latter was to pay a certain amount of money at certain specified times, and the former was to execute a sufficient conveyance for the land in controversy when the money was so paid. But if the money was not so paid, Barrett reserved to himself the right to affirm or rescind the contract of sale.

Under these circumstances it is plausibly contended, that Barrett should have notified Wilford of his election to disaffirm the contract before he could institute a suit for the purpose of putting him out of possession. But it will not become necessary to decide that question now.

The promise on the part of Wilford, as above stated, was embodied in five promissory notes. These were delivered to Barrett, and Wilford was put into possession of the land. I feel satisfied that Barrett or his assignee ought not to be allowed to maintain his action of right before he had not only given Wilford notice of his election, but had also surrendered up the promissory notes aforesaid, or at least showed a readiness to surrender them. Until that time, Wilford could not know whether the land was his or not.

Barrett could only be permitted to rescind the contract by showing Wilford that his notes had not been negotiated, and that he might therefore safely surrender the land. The law will not allow a party to be sued while he has not the means of knowing that he is liable, or at least while the means of that knowledge are exclusively in the possession of the opposite party. Before Wilford was dispossessed of his land, he ought to have been shown that he was not also liable on his notes.

The case of Maynard's lessee *v.* Cable, Wright's Ohio Reports, 18, cited by defendant's counsel, seems to sustain this view of the case. There the parties had exchanged lands, with an agreement to execute deeds of conveyance within six months. At the end of that time, Cable being unable to comply with his contract, Maynard instituted his action of ejectment, without offering to restore the land he had received in exchange, or giving any notice of the rescission of the contract. The Court in that case, say: "The entry of the defendant was not tortious but lawful. His covenant to convey is outstanding and no means have been taken, by restoring the consideration or otherwise, to rescind or annul the contract. The filing the declaration in ejectment does not, in our opinion, rescind the contract. In this class of cases some steps should be taken to determine *327 the lawful possession of the defendant, *some demand or notice should be given to the tenant before suit is brought, and so are the authorities."

The present seems to me entirely a parallel case. Instead of an exchange of lands, as in the case cited, lands were exchanged for negotiable promissory notes, accompanied by an exchange of possession. The notes were quite as available property as land itself, and the necessity of restoring them before commencing suit seems quite as great as in the case from the Ohio Reports.

The authorities cited by the counsel for the plaintiff in error on this point do not sustain the position they assume.

Those from the English Common Law are most nearly in point of any I have been able to examine. In the case of Hawden *v.* Mendisable, 12 E. C. L. 8, it was decided that where a bill of exchange was given for goods, an action might be brought for goods sold without producing the bill of exchange at the trial, such bill then lying protested in the hands of the plaintiff's agent. The same case in a different shape with the same decision is found in 17 E. C. L. 151. The English practice in these cases appears to be, to give judgment for the plaintiff, and then the defendant may pay the money into Court and move for a stay of the execution until the bills are delivered up. Unless these decisions are to be regarded as founded upon peculiar grounds, they certainly are not followed by the Courts in the United States generally. The general rule here is that the plaintiff may sue for the consideration of a note or bill but they must in that case be surrendered up on the trial. 1 Johns. 34; 8 Johns. 149; 10 Johns. 105; 8 Cowen, 77.

But, however such a question may be decided, it ought hardly to effect this case. To sue for the consideration money arising from the sale of property is very different from an action to obtain a re-possession of the property itself. The one is founded upon an affirmance, the other upon a rescission of the contract of sale. No person should be permitted to rescind a contract without at least a proffer to restore the advantages he has derived from that contract.

It will not be necessary, therefore, to examine the other points in the case. I am of the opinion that the decision below was correct and that the judgment should be affirmed.

*328 *Oliver Clark, plaintiff in error, *v.* John Gibson, defendant in error.

Error to Linn.

A verbal agreement between the plaintiff and defendant on a trial before a justice of the peace, that a verdict in his Court should be final, may, if broken, be the grounds of an action, but will not be allowed to be pleaded in bar to the action, when removed to the District Court by appeal (*b.*)

The facts are embodied in the opinion of the Court.

Hastings, for plaintiff in error.

Rorer & Whicher, for defendant in error.

Per Curiam, Mason, Chief Justice.— This was an action commenced before a justice of the peace, and brought by appeal into the District Court of Linn county. It appears that upon the trial in that Court, after the evidence was closed, the Court charged the jury that if they found that the parties had verbally agreed, on the trial before the justice of the peace, that the verdict of the jury in the Court below should be final, they must find for the defendant; that such verbal agreement was a circumstance for them to consider in bar to the action in the District Court, and that parol testimony was competent to prove such agreement. This is the only error assigned in the case.

We think this was an erroneous instruction. The agreement above alluded to might, if broken, be the ground of an action, but would not be a bar to that already in Court.

(*b*) See Lyon *v.* Sanders, 8 Gr. 332; M. & M. R. R. Co. *v.* Byington, 14 Iowa, 572; Rev. § 3204; Seacrist *v.* Newman, 19 Iowa, 323; Rev. §§ 3521, 3522.

The contract could not be specifically enforced in a Court at law.

But it is contended that the bill of exceptions does not show that the instructions above set forth were material, and although erroneous, ought not to avail the plaintiff in error. Where a party calls for instructions, which are refused, and he endeavors to reverse a judgment for that cause, he must certainly show in his bill of exceptions that the evidence given rendered such instructions proper. Nor would a judgment be reversed on account of the statement by the Court of an erroneous abstract proposition. But the instructions of the Court in this case carry presumptive evidence of being practical and applicable to the case. The *Court would certainly not voluntarily *329 give instructions in that shape, unless there were some testimony to render them applicable and if a party calls for such instructions he ought not afterwards to be permitted to deny their pertinency. Judgment set aside, and a new trial ordered.

JOHN F. WEBB and THOMAS L. THURSTON, plaintiffs in error, *v.* PHILIP MAURO, defendant in error.

Error to Des Moines.

Where a witness has received letters purporting to be from A B, and has answered one of them but has received no reply, he cannot, with no other evidence of the hand-writing of A B, be a competent witness to prove his (A B's) signature to a power of attorney (*c*).

This was an action of assumpsit brought by Philip

(*c*) See Rev. § 3997; Hyde *v.* Woolford & Bacon, 1 Iowa, 159; State *v.* Hinkle 6 Iowa, 380; Barker *v.* Mygatt, 14 Iowa, 131; Morris *v.* Sargent *et al.* 18 Iowa, 90.

Mauro against John F. Webb, impleaded with Thomas L. Thurston. At October term, 1842, there was a verdict and judgment for plaintiff for $631.86. The defendants below brought the case up for reversal. Six errors were assigned and argued, but, as the Court considered but one, we shall omit them. The one considered is embraced in the opinion of the Court.

GRIMES & STARR, for plaintiffs in error.

D. RORER, for defendant in error.

PER CURIAM, MASON, CHIEF JUSTICE.— The first point made by the counsel for the plaintiffs in error in this case is that the Court erred in admitting the power of attorney to be read without legal proof of its execution. It appears from the bill of exceptions that when the cause came on for trial on the plea of the general issue, the plaintiff below called a witness to prove the execution of a power of attorney, purporting to be signed by the defendants below, and constituting one Wm. H. Mauro their agent. Said witness stated that he had never seen Thomas L. Thurston write; that he had received two letters on business, purporting to come from said Thurston, and dated at Washington city, and to one of which he replied; that he had no reason to doubt but that they were genuine.

He was then asked by plaintiff's counsel if he
*330 would not *judge the signature of Thurston to said power to be genuine, to which defendant's counsel objected, but the Court overruled the objection, and permitted the power of attorney to be read (the execution of said instrument by the other defendant, Webb, having been first proved).

We think the Court below erred in admitting the power of attorney in evidence upon the testimony set forth in the bill of exceptions; for although it is not necessary, in all cases, for the witness to have seen a person write, in order

to be a competent witness by whom to prove his signature, still, we think the present case does not fall within the legal exception. The witness in the present instance had received two letters purporting to come from the defendant, Thurston, to one of which he had replied. Had the correspondence been continued, the probabilities of imposition would have been so far rebutted as to render him a competent witness to prove the fact in question; but if the receipt of two letters, and an answer by the witness before any reply has been made to said answer is sufficient to enable the witness to swear to the signature, it will be a very easy matter to manufacture testimony of that nature.

Judgment set aside, and a new trial awarded.

The United States *v.* Martin Hiler, impleaded with Elizabeth Hiler.

A brother and sister must each be over the age of sixteen years to incur the guilt of incest under our statute (*d*).

The defendants were indicted for incest. The points saved and determined are embodied in the opinion of the Court.

L. D. Stockton, district prosecutor.

Rorer, for defendant.

Per Curiam, Mason, Chief Justice. — The question presented by this case is whether a brother who is over the age of sixteen years is guilty of the crime of incest under the statute, by having sexual *intercourse with *331

(*d*) This was so by the terms of the statute of 1839. But see Rev. §§ 4367, 4368, 4369, 4370.

his sister, who is under that age. The statute, among other classes of offenders, includes *any brother and sister, who, being of the age of sixteen years, or upwards, shall have sexual intercourse together, having knowledge of their consanguinity.* Must not both parties in such a case be over the age of sixteen years, in order that either should be guilty?

The first natural impulse to answer this question is the negative, for why should the brother be permitted to screen himself from deserved punishment behind the fact that the sister was too young to be guilty of the crime herself? That circumstance would seem to aggravate the heniousness of the act, as calling more loudly on him for fraternal care and guidance.

Still, we think a more critical examination of the matter, will lead us to a different conclusion. The literal reading of the law is different. The indictment is drawn up in strict accordance with the statute, when it charges that both the brother and sister were over the age of sixteen years. This is a material allegation, and the proof should have corresponded with it. The indictment would have been bad on demurrer, had this allegation been omitted.

It is contended that the intention of the legislature in a case like this must have been to punish the party who was of sufficient age, and to exempt the other. It may be that such was the case, but yet that conclusion can hardly be gathered from the words themselves, and the strictness of construction which is always applied to penal statutes prevents us, except in extraordinary cases, from making any deflection in the direct meaning of the language of the statute, even for the purpose of administering what we may deem better justice.

But we are far from being fully satisfied that such was the intention of the law. Why was the arbitrary age of sixteen fixed in this statute? Not certainly because the parties

then for the first time became *doli capax.* They would have been liable to be punished for murder at a much earlier period. But sixteen is considered the ordinary age of puberty, and finds its way into this statute we think rather from a consideration of physical than of intellectual incapacity in those of more tender years. The conclusion is by no means unnatural that the crime of incest contemplated by the statute is not completed by a mere offense against decency — the exhibition of a most revolting spectacle, which the present case fully presents — but that it consists in the sexual intercourse of persons sustaining the relation of brother and sister, *under circumstances which may be expected to be followed by the natural consequences of* **such intercourse between adults.* If either of the *332 parties is below the age of puberty, such a consequence cannot result. The crime cannot then be committed, and neither party is, therefore, liable to punishment.

If such a construction is not perfectly satisfactory, it coincides with the literal reading of the statute, and at all events is not so absurd or unreasonable as to justify the conclusion that the legislature meant something different from the natural import of the language used.

Judgment affirmed.

WAU-KON-CHAW-NEEK-KAW *et al.* plaintiffs in error, *v.* THE UNITED STATES, defendant in error.

Error to Dubuque.

An omission of the clerk in certifying a record upon a change of venue to state the name of the judge, that the jury were lawfully sworn, interrogated, &c., at the time the indictment was found, cannot be assigned for error.

The endorsement on an indictment of the words "a true bill," with the foreman's name, is merely directory, and if there are other proofs in the record that the grand jury duly returned the bill, it is sufficient.

Wau-kon-chaw-neek-kaw *v.* The United States.

After a defendant has so far admitted the sufficiency of the indictment as to consent to go to trial, especially after the unanimous verdict of a petit jury, it is too late to question the regularity of the proceedings by which he was put upon trial.

It is not necessary that the grand jurors should be sworn to enquire of offenses committed in an unorganized county. For judicial purposes it bears the name of the county to which it is attached.

An opinion formed from rumor is sufficient to exclude a juror; but it must be an opinion as to the guilt or innocence of the prisoner then on trial.

The law will not permit a witness to be interrogated upon a collateral matter, merely for the purpose of afterwards contradicting such immaterial statements (*e*).

GRANT, for plaintiffs in error.

This was an indictment against Wau-kon-chaw-neek-kaw and two other Indians, for the murder of Moses Tegarden, tried at the August term of the Dubuque District Court.

The first error on which the plaintiffs in error rely is that it does not appear from the record that the grand jury who found this indictment were lawfully sworn.

*333 *The indictment in this case was presented and found at the Clayton District Court. The record transmitted to the Dubuque, reads thus: "District Court, for Clayton county, Iowa territory, April term, 1843. The grand jury returned into Court the following as true bills, &c.

It requires no argument to prove that the record must show that the grand jury were sworn. It is one of those plain propositions which strikes every lawyer's mind as unqualifiedly true. See, in point, 1 Saund. Rep. 249.

2. The record does not show that the grand jurors were sworn and interrogated as to their qualifications.

3. The record does not show any, or who was the judge

(*e*) When the statements of a witness may be contradicted, see Burrows *v.* Goodhue, 1 Gr. 48; Glenn *v.* Carson, 3 Gr. 529; Ross *v* Hayne, *ib.* 211; Cocklay *v.* The State, 4 Iowa, 477; The State *v.* Khul, 8 Iowa, 447; Morrison *v.* Myers & Turner, 11 Iowa, 538; Samuels *v.* Griffiths, 13 Iowa, 103; Strunk *v.* Ochiltree, 15 Iowa, 179.

of the Clayton District Court, when this indictment was found.

4. The record does not show that the indictment was endorsed by the foreman as a true bill. See, precisely in point, 5 Greenleaf, 432.

5. The record does not show that the grand jurors were sworn to enquire of offenses in Fayette county (attached to Clayton).

6. The Court erred in overruling the challenge of the prisoner to divers jurors, and particularly to one Anderson.

[The last exceptions are sufficiently recited in the opinion of the Court.] Further citations by Mr. Grant: People *v.* Mather, 4 Wend. 229, 241; 6 Cowen, 555; 7 Cowen, 108; 1 Burr's Trial, 370, 419; 1 John. Rep. 316; 1 Cowen, 432.

7. The Court erred in permitting Wilson and Beatty to testify as to the injuries committed on Isaac and Maria Tegarden.

8. The Court erred in refusing to permit L. B. Lowry to testify that Isaac Tegarden heard a conversation in relation to the title of a certain gun, and that afterwards he swore for the first time that the gun was sold to his father.

CRAWFORD, for defendant.

The first and second errors assigned may be considered together. To either advantage might have been taken by a plea in abatement, but the judgment cannot be affected for those causes. See statute, p. 157. The statute requiring the grand jurors to be sworn is merely directory, and the Court will be presumed to have done its duty until the contrary appears. As to directory statutes, see Cole *v.* Perry, 6 Cowen, 584.

There is no error in the matter thirdly assigned. The law declares which judge shall hold the Court in Clayton and this Court will take notice of it. Again, if the Court

was not holden by the proper judge, or if it does not so appear, this would have been a proper matter for a plea in abatement.

*334 *The record does show that the indictment was returned into Court as a *true bill.* It could not have been returned a true bill unless the foreman made the proper endorsement. This again was a proper matter for a plea in abatement. 1 Chit. Cr. Law, 438, 445.

The statute of Wisconsin does not attach Fayette county to Clayton. It makes it a part of Clayton for all purposes.

Anderson, the juror, answered that he had formed no opinion as to the guilt of the prisoner. I apprehend that the guilt or innocence of the prisoner is the question, and the only question to be tried by the jurors. And Anderson shows himself by his answers wholly impartial. See 8 John. 445; 4 Wend. 229; 6 Wend. 603.

The sixth and seventh assignments are not applicable to the case under consideration.

As to the eighth, Lowry was called to impeach the witness, Moses Tegarden, by contradicting him in the answer to a question on cross-examination, which interrogatory was as to irrelevant matter. If a party on a cross-examination of a witness put impeaching questions as to irrelevant matters, the party is bound by the answer of the witness, and cannot call witnesses to contradict him. 1 Starkie, 181.

Per Curiam, Mason, Chief Justice. — The first three errors assigned in this case can all be disposed of at once. In substance they are: —

1. That the record does not show that the jury were lawfully sworn.

2. That it does not show that they were sworn and interrogated as to their qualifications.

3. That it does not show who was the presiding judge at the time the indictment was found.

The clerk of the District Court of Clayton county, in transmitting a copy of the record to Dubuque county (upon change of venue), failed to prefix a caption to the transcript. He has only copied the record of those proceedings which are peculiar to this case, omitting to set forth those which would show the term of the Court to have been legal, or the grand jury to have been regularly impannelled and sworn.

The English practice is to state those proceedings wherever a case is transferred to another Court by writ of error, or otherwise, but that practice has never been followed in this territory. The clerks of the District Courts, in certifying up their transcripts, generally insert, in a brief caption, the name of the presiding judge of their Court, but it is doubtful whether a case can be found on the files of this Court, where the names of the grand jury, the nature of their oath, and other forms in analogy to the English practice, will be found to have been inserted. *Is *335 it expedient to change our course of proceeding in this particular? We think not. It would be augmenting the bulk of our transcripts unnecessarily. A more convenient, and just as safe a rule is that which has been always observed here; that in these respects the proceedings below will be presumed to have been correct, unless the contrary is shown by the plaintiff in error. This leaves the plaintiff in error full power to take advantage of any defect which he can show to exist in the proceedings, and if by possibility any mere irregularity should pass unnoticed and uncorrected, a defendant can hardly be thereby prejudiced, who afterwards has a full trial on the merits by a competent and impartial jury. It would be subversive of justice to allow a party to remain silent in relation to matters of this nature until after a final hearing, and then to obtain a re-hearing of the case and put the public to the trouble and expense of a new trial, merely because a clerk of the District Court omitted a caption to his

transcript. Even the English Courts would not have done this, especially at the first term. See Faulkner's case, 1 Saund. R. 249.

The omission of the caption in this case is not, it is true, by the clerk of the Court of Dubuque county, but of Clayton county, in certifying the transcript and change of venue, but that circumstance does not seem as though it should change the course of reasoning or the decision of this Court.

The fourth error assigned is that "The record does not show that the indictment was endorsed by the foreman as a true bill." The record states that the grand jury returned this bill into Court (among others) as a true bill, but the endorsement required by the statute is entirely wanting, so far as appears from the transcript. Under these circumstances, should the omission be deemed a fatal defect? The law requiring the words "a true bill," with the foreman's name subscribed thereto, to be endorsed upon a bill of indictment, is merely directory. This is doubtless intended as the appropriate evidence of the same having been regularly found. But where there is other proof that the grand jury duly returned the bill into Court as "a true bill," we think that furnishes sufficient *prima facie* evidence of regularity in this respect to prevent an omission of the required endorsement from becoming a fatal defect at this stage of the proceedings.

In fact there is a consideration connected with this idea which applies to this as well as to many other of the objections raised in this case. The object of a bill of indictment is merely to put the party accused upon his trial.

Our law watches over the rights of the citizen with
*336 so *much care that it will not even allow him to be put to the trouble, vexation, and expense incident to a defense in Court, until a majority of twenty-three good and lawful men, upon their oaths, have declared him guilty. If there be error or irregularity in the finding of the in-

dictment, he ought not to be made to enter upon his defence.

But after the proper time has passed for making this objection; after he has so far admitted the sufficiency of the indictment as to consent to go to trial, especially after the unanimous verdict of a petit jury pronouucing him guilty, it would seem rather late to question the regularity of the proceedings by which he was put upon his trial. The result furnishes strong evidence that he ought to have been tried.

Where there has been a substantial error in such proceedings, it would doubtless be in accordance with established authorities to reverse the case on that account. We should not have felt justified in deviating from such a rule. But where there is a mere irregularity in the form of the proceedings, a simple deviation from some directory rule, the reasoning above stated seems to us so just and forcible that we should not feel disposed to be governed even by stronger authority than the only one cited on this point by the counsel for the plaintiffs in error (5 Greenleaf, 432).

The next error assigned is, that the record does not show that the grand jury were sworn to enquire of offenses in Fayette county. The reasons against the previous objections apply also to this, but in addition thereto, we think it was unnecessary the grand jury should have been thus sworn. The law on this subject, after setting off a tract of country to be called Fayette, declares that it shall "for temporary purposes be attached to and *in all respects* be considered a part of the county of Clayton." Acts of Wisconsin, 1837–8, pages 11, 12. There was no more need of having the grand jury specially sworn to enquire into offenses committed in Fayette than in any other district or township in Clayton county.

The sixth error assigned is, that the Court erred in overruling the challenge of the prisoner to divers jurors, and

particularly to one Anderson. It appears from the bill of exceptions that Anderson, when called on as a juror, stated as follows: —

"I cannot say that I have formed or expressed an opinion as to the guilt or innocence of the prisoner at the bar. I believe I have not as to him. I heard the reports that Tegarden and family were killed by Indians, and I believed that report. Who those Indians were that did it, I cannot say. I still believe that Tegarden and family
*337 were killed by *Indians, and I should go into the jury box with that belief on me, to be removed by evidence. I formed no opinion as to whether the killing was murder; I thought and still think it was a crime. I took no interest in the matter; have no bias or prejudice against the prisoner; I did not think about the killing being in self defense; I do not think I have any ground to form an opinion on that subject. If it should be in self defense I should not think it a crime."

The burden of this statement appears to be that the juror had heard reports that the family had been killed by Indians, and that he believed such report. It has been made a question whether any opinion formed from rumor is sufficient to exclude a juror, but we think the weight of reason and authority is clearly in favor of such exclusion where an opinion has been formed or expressed as to the guilt or innocence of the person immediately accused. But such was far from being the case in the present instance. The juror stated that he had no bias or prejudice against the prisoner, but merely gave credit to the reports that some Indians had done the deed, and he believed that the act was a crime unless done in self defense. We do not think this case can be brought within the range of the authorities cited by the counsel for the plaintiff in error, which are all founded upon the basis that that the juror had formed an opinion as to the guilt or innocence of the prisoner then on trial. We think it would be going too great lengths, to ex-

tend the rule inflexibly to a case like the present. A good deal of discretion should be left with the District Court, for all the circumstances of the case can never be fully presented here. Although, therefore, we would not have deemed it error in that Court to have rejected this juror for the cause above set forth, we feel equally satisfied that a new trial ought not to be granted on account of the refusal to reject.

The error set forth in the seventh assignment of errors is not available here, at all events as the decision of the Court there excepted to does not seem to have occurred on the trial of either of the present plaintiffs in error.

The last error assigned is that the Court erred in refusing to permit L. B. Lowry to testify that Isaac Tegarden heard a conversation in relation to a certain gun, and that afterwards he swore for the first time that the gun was sold to his father. This evidence was offered for the purpose of impeaching the testimony of young Tegarden. The whole evidence in relation to the gun was collateral and not material to the issue, and the law does not permit a witness to be interrogated upon a collateral matter, merely for the purpose of afterwards contradicting his *statements thereupon. See 1 Starkie on Evi- *338 dence, 181–2; 2 Starkie, 222–3. There was no error, therefore in the ruling of the Court upon this point.

Judgment affirmed.

CHESTER SAGE & Co. plaintiffs in error, *v.* ANDREW KEESECKER, *et al.* defendants in error.

Error to Dubuque.

A person having a mere right of possession cannot interpose a plea of *title* in an action of trespass against him.

The plea of title, contemplated by the statute, is such only as may be legitimately pleaded specially, in contradistinction to the general issue.

Chester Sage & Co. *v.* Andrew Keesecker.

A defendant in an action of trespass, who wished to protect himself by his right of possession to the *locus in quo*, by a title less than freehold, must plead the general issue.

This was an action of trespass upon lands, commenced before a justice of the peace, by Andrew Keesecker, Rudolph Noble, and John Cook, against Chester Sage. The defendant put in a plea of title, and the case was removed to the District Court. A trial was had at the November term, 1843, and a verdict and judgment for five cents damages, and costs rendered for the plaintiffs.

On the trial the defendant offered to prove by witnesses that they were entitled to the possession of the lands upon which the said trespasses were alleged to have been committed, and that they had a valid claim thereto at the time said trespasses were alleged to have been committed, and were then entitled to the possession thereof by virtue of said claim according to the laws of the land. To the giving of which testimony the plaintiffs objected, and the objection was sustained. The defendants excepted.

Davis & Crawford, for plaintiffs in error, assign for error:—

1. That the Court below refused to permit the said Chester Sage & Co. to prove the title to the premises in which the alleged trespasses were charged to have been committed,

by proving the same to be embraced in their "claim" to
*339 the public lands, according to the usage and *custom
of the neighborhood in which the same are situated,

and in conformity with the law of this territory respecting claims of persons settled upon the public lands.

Rogers, for defendants.

Per Curiam, Mason, Chief Justice. — In this case it will become necessary to decide whether a defendant who, by interposing a plea of title, transfers an action of trespass

from before a justice of the peace into the District Court, can there give in evidence a mere right of possession. What is to be understood by the "plea of title" mentioned in the statute, and what kind of title can be relied upon in support of such plea? Evidently only such as may be legitimately pleaded specially, in contradistinction to the general issue. We know of no other plea of this nature but the plea of *liberum tenementum*, or freehold. 1 Chitty 541; Stephen on Pl. 314.

And what then must be done by a defendant in such an action who wishes to protect himself by the fact that he had the right of possession to the *locus in quo* by a title less than freehold? He must plead the general issue. The plaintiff in the first instance is only bound to show actual or constructive possession. But it is a good defense under the plea of *not guilty* to show a right of possession in the defendant. Hyatt *v.* Wood, 4 Johns. 150. Even a freehold title may be given in evidence under general issue, *ib.* But still it may be pleaded specially, because it does not negative color of title in the plaintiff. Citty & Stephen *ut supra.* But the right of immediate possession cannot be specially pleaded as it would amount to the general issue; Collett *v.* Flinn, 5 Cowen, 466.

The defendant having brought a case into the District Court by a plea of title, must rely upon that plea alone. Statutes of 1843, page 319. He cannot deny the trespass, nor resort to the proof of such title as would not be pleadable specially, and which could only be given in evidence under the general issue.

Judgment affirmed.

*340 *FRANCIS PERRY and STEPHEN HEADLY, plaintiffs in error, *v.* WILLIAM BENNER, defendant in error.

Error to Muscatine.

On a *certiorari* in pursuance of the act of January 14, 1840, if the bond is substantially defective, it cannot be amended and the defect supplied in the District Court.

The *certiorari* authorized by this act is only another mode of taking an appeal. In an appeal proper the statute expressly gives the right to correct a defective bond; not so in the *certiorari* act, and the Court will not allow an amendment and thereby enlarge the opportunity for a second jury trial (*f*).

Benner sued Perry and Headly before Washburn, justice, on a note for twenty-five dollars, and obtained judgment. The defendants removed the case upon a *certiorari* to the District Court. Here a motion was made by Benner to quash the writ of *certiorari* for the want of a sufficient bond. Whereupon, Headly and Perry offered to execute a good and sufficient one, to which Benner objected, and the objection was sustained, the *certiorari* dismissed, and a *procedendo* awarded. These are the errors complained of, and for which the plaintiffs on *certiorari* seek to reverse the judgment of the District Court.

HASTINGS, for plaintiffs in error.

WHICHER, for defendant in error.

PER CURIAM, MASON, CHIEF JUSTICE.— The only question presented by this case is, whether in case of a writ of *certiorari*, issued in pursuance of the act of January 14, 1840, if the bond is substantially defective, such defect may be supplied in the District Court so as to preserve the writ

(*f*) Under the Revision, *certiorari* is not in the nature of an appeal.

from being quashed. The *certiorari* authorized by that act is only another mode of taking an appeal; the only substantial difference being, that in the one case the party has seven, in the other, thirty days within which to appeal In the case of an appeal proper, the statute expressly gives the right to correct a defective bond; in relation to a *certiorari*, no such provision is contained. If the legislature had desired to give the same right of amendment in the latter as in the former case, they might easily have so declared. It is hardly expedient to strain the law in order to enlarge the opportunity to obtain a second *jury *341 trial. As the case stood when this writ was issued, the party has an opportunity for a jury trial in the justice's Court. If dissatisfied, he can appeal within seven days, and in case his appeal bond is defective it can be amended in the District Court. If he allows this time to pass, he may, within thirty days from the time of trial, bring the case up to the District Court for a full hearing before a jury. But in this case the law requires, as a prerequisite, the filing of a sufficient bond, and makes no mention of the power to amend. We do not think it necessary to go beyond the letter of the law in this particular. The facility for appeal has already grown to be an evil.

A *certiorari*, as elsewhere generally understood, is nearly equivalent to a writ of error. It merely brings up the case from the justice's Court to enquire into and correct errors of law. Such a writ should be favored in the higher Courts. The authorities cited by the counsel for plaintiffs in error were, we think, all in cases of writs of this nature, and, therefore, not applicable to the case at bar for the reason above stated. We think the ruling of the Court below was correct.

Judgment affirmed.

THE UNITED STATES *v.* LEWIS B. MORGAN.

Certiorari to Jefferson.

On an indictment for perjury in taking the oath of bankruptcy, it is too indefinite to charge generally that the defendant committed perjury in falsely swearing to his schedule. It should be charged in what particular the perjury consisted.

At the April term, 1843, of the District Court for the county of Jefferson (which Court was sitting as a Circuit and District Court of the United States), Lewis B. Morgan was indicted for perjury. The indictment is as follows: —

"The grand jurors for the United States, duly impannelled and sworn to enquire in and for the body of the county of Jefferson, at a District Court of the United States, begun and held for said county, on Monday, the 3d of April, 1843, on their oaths present, that Lewis B. Morgan, at the county aforesaid, on or about the 18th July, 1842, filed his petition in bankruptcy in and
*342 before said Court, sitting in bankruptcy *as a District Court of the United States, praying to be declared a bankrupt, and dealt with accordingly. To which said petition a schedule was annexed as part of the same, purporting to set forth, to the best of the knowledge and belief of the said Morgan, a list of his creditors, their respective places of residence, and the amount due by the said Morgan to each of them, together with a pretended accurate inventory of the property, rights, and credits of said Morgan of every name and description, and the location and situation of each and every parcel and portion thereof; his, the said Morgan's wearing apparel, and that of his wife and children excepted. Which said petition being produced before John A. Pitzer, the clerk of the District Court aforesaid, he, the said Morgan, did corrupt-

ly and falsely swear on his oath that the said petition was true, and the said schedule correct to the best of his knowledge and belief. Which said oath was reduced to writing and signed by the said Morgan, and attested by the said Pitzer, clerk as aforesaid, who had before that time been duly appointed commissioner in bankruptcy by said Court, and was authorized to administer oaths. And the said schedule annexed to said petition was not correct to the best knowledge and belief of the said Morgan, but was false and incorrect. And so the jury aforesaid, on their oaths aforesaid, do say that the said Morgan, in manner and form aforesaid, did commit willful and corrupt perjury, and did falsely and corruptly swear before the said commissioner in the said proceeding, against the peace and dignity of the United States, and contrary to the form of the statute in such case made and provided."

To this indictment a demurrer was filed, which was sustained by the Court. The sustaining of the demurrer is the error assigned.

L. D. Stockton, district prosecutor, for plaintiff.

Hall & Shuffleton, for defendant.

Per Curiam, Wilson, Justice. — The technicality and precision required at one period by the Courts of England having been found to operate as a denial of justice, were abandoned by those Courts, and the Courts of this country have gone still further in simplifying and abbreviating the forms in criminal proceedings. Nothing further is now required than a plain statement of the accusation; a setting forth of those matters in which the guilt of the accused is alleged to consist. The indictment should apprise the defendant of what he is called upon to answer. In going thus far Courts have but followed the light of reason, but were they to go further than this and

*343 say that an indictment *is sufficient which does not set forth the circumstances in which the guilt of the accused consists, evils would follow far greater than those which resulted from the decisions of the English Courts when they went into the opposite extreme. Does the indictment in this case set forth sufficient to enable the defendant to prepare his defense? We think it does not. The only assignment of perjury is that the schedule was false and incorrect. This is too general — too uncertain. It should have set forth wherein the schedule was false and incorrect. The indictment sets forth that "The defendant filed with his petition, as part of the same, a schedule purporting to set forth, to the best of his knowledge and belief, a list of his creditors, their respective places of residence, and the amount due by the said Morgan to each of them, together with a pretended accurate inventory of the property, rights, and credits of said Morgan of every name, kind, and description, and the location and situation of each and every parcel and portion thereof; his, the said Morgan's wearing apparel, and that of his wife and children excepted." It further sets forth that said Morgan appeared before John A. Pitzer, the clerk of the District Court aforesaid, and did falsely and corruptly swear that said petition was true, according to the best of his knowledge and belief, whereas, in truth and in fact, said schedule was false and incorrect." Did the falsehood consist in, first, leaving out some of his creditors? If so, who were the persons omitted? Or, secondly, did it set forth certain persons as creditors who were not really so? If so, who were they? Or, thirdly, did it incorrectly set forth the place of abode of the persons represented as creditors? Or, fourthly, was the amount alleged to be due to all or any one of them incorrect? Or, fifthly, was the inventory of the property, rights, and credits of said Morgan incorrect in amount? Or, sixthly, in the location of such property, rights, or credits? Or, seventhly, in the description

of them? Or, eighthly, was the inventory of his wearing apparel and that of his children and family false and incorrect?

To require a defendant to stand prepared at all of these points upon this indictment would be unjust and oppressive in the extreme. We think the indictment cannot be sustained.

Judgment below affirmed.

CHAUNCY SWAN, Commissioner, plaintiff in error, *344

v. JOHN R. EWING *et al.* defendants in error.

Error to Dubuque.

Where A purchases from B, a town commissioner, a lot of land, and pays twenty-five per cent in advance, and gives his note for the balance of the purchase money, if B by mistake gives a certificate for a different lot, and the lot which was designed to be sold to A is sold to a different person, upon a suit brought upon A's notes he will be permitted to show, by parol evidence, the mistake, and that the notes were given without a legal consideration. And a plea to set off the amount paid in advance is good. Here the mutuality of the demands has relation to the funds.

This was an action of assumpsit brought by Chauncy Swan (late acting commissioner of Iowa City, who sued for the use and benefit of the territory of Iowa) against John R. Ewing and James G. Chatham, upon three notes, for sixty-six dollars and twenty-five cents, each, dated August 19, 1839, and payable six months after date to Swan, acting commissioner, &c. The declaration is in the usual form, without any of the common counts.

The defendants plead the general issue, with notice of failure of consideration, in consequence of the mistake in the sale of lots for which said notes were given, set off, &c.

Chauncy Swan, Commissioner, v. John R. Ewing.

At November term, 1843, judgment was rendered for the defendants for the money advanced; to-wit: $66.25. The plaintiff sued out a writ of error from this Court.

The following bill of exceptions sets forth all the errors assigned in the case:—

"Be it remembered that on the trial of this cause defendants produced witnesses to prove that the notes in the declaration mentioned were given for the three last installments due for the purchase of a lot in Iowa City, at the public sale of lots of said city in August, 1839. That defendants, at said sale, bid off lot No. 4, in block No. 97, and not lot No. 3 of same block; that the certificate of purchase given defendants by said Swan, of purchase of lot, was made out for lot No. 3, by mistake, instead of lot No. 4; that the next morning after the sale, and after the first installment of the purchase money was made, and after said certificate was made out, said defendants discovered

*345 said mistake, and *applied to said Swan to correct the same, who excused himself from doing so then on the plea of want of time; that they again subsequently applied to him to correct said mistake, when he replied that he could not do it, for he had sold the lot to another man. To proving all which plaintiff, by his counsel, objected, which objection was overruled by the Court, and said testimony permitted to be given.

"The defendants then offered in evidence the conditions of said sale as follows:—

"Iowa City, October 7, 1839.

"Ordered by the board of Commissioners at Iowa City, that the following be the terms of the second sale of lots; viz: In all cases the highest bidder, above the minimum price, shall be the purchaser; one-fourth of the purchase money will be required in hand, the balance to be paid in three equal installments without interest, at six, twelve,

and eighteen months. Should any purchaser fail to pay either of the installments as they fall due, whatever money has been paid will be forfeited and the lot sold again at the next succeeding sale. All purchasers are required to pay their first payment and take their certificate within two days from the close of sale, or otherwise forfeit their bids.

"C. SWAN,
"JOHN RONALDS, } *Commissioners.*

"The above are the conditions of the sale of lots in Iowa City, at the first sale, also, except so much of the above as requires the purchasers to take their certificates within two days from the close of sale, or otherwise forfeit their bids.

"C. SWAN,
"*Late Acting Commissioner.*

"And also proved that the said Chauncy Swan, the plaintiff, admitted said paper to be the conditions of sale as therein stated. To which, being given in evidence, plaintiff also objected, which objection was by the Court overruled, and said paper received as evidence of the conditions of sale.

"Defendants also produced to the Court the certificate of the sale to them of lot No. 3, in block No. 97, in which a mistake was alleged to have occured, as aforesaid, and also proved the payment of the first installment on their said bid to the said plaintiff, amounting to the sum of sixty-six dollars and twenty-five cents. To the proving of the last above item the plaintiff objected, but said objection was overruled by the Court.

*"The following is a copy of the certificate of pur- *346
chase above referred to.

"TERRITORY OF IOWA, IOWA CITY,
"Office of Commissioners of Public Buildings. }

"I, Chauncy Swan, acting commissioner of public buildings at the seat of government for the territory aforesaid,

do hereby certify that John R. Ewing and J. G. Chatham, of the county of Dubuque, in the territory of Iowa, this day purchased lot No. 3, in block No. 97, in the city of Iowa, the established seat of government of the territory aforesaid, and having complied with the terms of sale, the said John R. Ewing and J. G. Chatham, their heirs or assigns are entitled to a deed of conveyance, in fee simple, to said lot, so soon as the title is obtained from the government of the United States, for which conveyance the faith of the territory of Iowa is hereby pledged.

"Given under my hand this 19th day of August, A. D. 1839.

"C. SWAN,
"*Acting Commissioner of Public Buildings.*

"The plaintiff then offered in evidence the following certificate; to-wit:—

"OFFICE OF TERRITORIAL AGENT,
"Iowa City, May 10, 1843.

"I certify that lot number three (3), in block number ninety-seven (97), as recorded in the plat of Iowa City, was sold by Chauncy Swan, as acting commissioner, on the 19th day of August, in the year 1839, for the sum of two hundred and sixty-five dollars, and that Ewing and Chatham were the purchasers, as appears from the record of sales in this office.

"Given under my hand this 10th day of May, 1843.

"JNO. M. COLEMAN,
"*Territorial Agent.*

"It was admitted by the defendants that the persons named in the above certificate are the same as mentioned as defendants in this suit. Whereupon the plaintiff moved the Court to render judgment in favor of said plaintiff for the amount of said notes, with interest. But the Court refused, and rendered judgment for the defendants for the

sum of sixty-six dollars and twenty-five cents, to which the plaintiff, by his counsel, excepted," &c.

A. THOMAS, for plaintiff in error.

DAVIS & CRAWFORD, for defendants in error.

*PER CURIAM, MASON, CHIEF JUSTICE.— The first *347 question we shall consider is, whether the parol evidence of want of consideration was properly admitted in the Court below. That evidence was to the effect that the notes on which suit was brought were given to secure a part of the purchase money for a certain lot of ground in Iowa City, which had been purchased at a public sale of lots, and that by fraud or mistake of the acting commissioner, a receipt was given for a different lot, while the one actually purchased was afterwards sold to another person.

This evidence was clearly admissible. It will not be disputed that in a case like the present the defendant is permitted to show that the notes were given without consideration. Scarcely anything is more common in our Courts than such a defense, sustained by such proof. This is really all that was done in the present case, so far as respects the matter we are now considering. The lot was purchased, the notes executed therefor, and then, before any deed or written evidence of sale had been executed, the lot was sold to another individual. Here is a total want of consideration. The fact that a receipt was executed to the defendants for another lot does not change the aspect of the case. The purchaser was under no obligation to accept of any lot except that which he had bought.

The fact that the commissioners were a corporate body, or were required to keep a record, makes no difference in this respect. No party is permitted to make evidence for himself; much less will he be allowed to make evidence which the other party will not be permitted to contradict in the ordinary mode.

It is further objected that the defendants were allowed to introduce the written conditions of the second sale without it being shown by sufficient evidence that they were the conditions of the first sale. Neither does it sufficiently appear by the record that the lots were sold at the first sale. But even if that had appeared, we think the substantial identity of the conditions of the two sales was sufficiently shown by the writen admission of the acting commissioner to whom the notes were executed, and in whose name the present suit was brought.

The only remaining question to be considered is in relation to the set-off which the defendants were permitted to prove, and under which the defendants were permitted to prove, and under which they recovered a verdict. It is objected in the first place that the notice is not sufficiently definite. We think otherwise. The notice sets forth that the defendants claim the money paid by them at the time they made their purchase, amounting to twenty-five per cent of the entire price they were to have paid for the *348 lot. They claim that this amount *is due them from the said plaintiff. Now, Swan, himself, individually, is not the plaintiff. The demand is against him as commissioner.

Again, it is said that this claim cannot be set off because the respective demands were not mutual at the time the suit was commenced. We should find it difficult to conceive what demands were mutual if these were not so. A lot is sold by a duly authorized commissioner; one fourth part of the money is paid down and notes given for the balance; suit is brought on these notes, which the defendants not only refuse to pay, but they claim back the amount already paid; they claim their set-off out of the same fund into which their money is to be paid if recovered in this suit. On the one hand it is claimed that they are indebted to this fund, on the other that the fund is indebted to them. The demands are mutual.

Finally, it is insisted that the set-off is not in the same right as the demand, because if the contract is void on account of the mistake in regard to the lots, then the money paid to Swan was received in his own right. This by no means follows. The lot was sold by Swan as commissioner, the money paid to him as such. It is to be presumed that he did his duty and placed the money among the funds of the real plaintiff in this suit. That plaintiff has sanctioned the act of the commissioner by bringing this suit and urging the payment of the remainder of the money claimed to be due by virtue of this sale. It would be wholly unjust to allow this plaintiff, while thus waging the war on the one hand, to claim exemption from liability on the other.

We therefore think there was no error below.

Judgment affirmed.

THE UNITED STATES, on the relation of George W. Jones . plaintiff in error, *v.* TIMOTHY FANNING, defendant in error.

Error to Dubuque.

The Mississippi river, so far as it affords facilities for transportation, cannot be obstructed or monopolized. It is a common highway, and forever free.

The Mississippi, so far as it presents an obstruction to land carriage, is left to the *sound discretion of the legislature to provide *349 means for surmounting such obstructions by means of *ferries;* and it may, for this purpose, grant to individuals *exclusive privileges,* within reasonable limits, when done in good faith, for the purpose of furnishing an indispensable link in the chain of dry land transportation (*g*).

(*g*) On the subject of navigable rivers, see Walters *v.* The Steamboat Mollie Dozier, 24 Iowa, 192; McManus *v.* Carmichael, 3 Iowa, 1. As to the power of the general assembly to grant ferry licenses, see Phillips *v.* Town of Bloomington, 1 Gr. 498; Weld *v.* Chapman, 2 Iowa, 524; Steamboat Globe *v.* Kurtz, 4 Gr. 333.

The United States *v.* Timothy Fanning.

And such a privilege may be granted at the landing in front of Dubuque, although by the act of Congress of 1836, this front was set apart and appropriated for public highways and other public uses.

This was a proceeding in the nature of a writ of *quo warranto* by the United States, on the relation of George W. Jones against Timothy Fanning, to deprive him of the right and privilege of a ferry opposite the town of Dubuque.

The complaint set up was that the right of the ferry was given by an act of the legislature to Jones, and that Fanning intruded into and usurped the right.

Fanning pleaded that by an act of the legislature of Iowa, of the 14th December, 1838, the right of ferry was given to him upon certain conditions, which he had complied with; as also a supplemantary act of the 24th of July, 1840. This plea denied the right of Jones to the ferry, and concluded to the country.

Jones replied, protesting the right of Fanning, under his charter, to the ferry; denied that Fanning had complied with the conditions, and that he had thereby forfeited the privilege; and concluded with a verification and prayer for judgment.

A jury was sworn to try the issued joined, and, upon the trial, the relator asked the Court to instruct the jury that the act granting the privilege to Fanning was void, because not properly approved by the governor, which was refused; that the keeping of one boat was not sufficient, especially when moored at the Illinois shore at night; which the Court refused to give except in a modified shape; to-wit: That the mere fact of mooring the boats at night on the Illinois shore, after ferrying hours, as prescribed by law, would not be a forfeiture.

The jury returned a verdict that Fanning had not forfeited his charter, and that he had a right to the enjoyment of his privileges.

Judgment was thereupon rendered in favor of the defendant, Fanning, for costs.

The relator, in the name of the United States, seeks to reverse the judgment below on a writ of error from this Court.

Errors assigned: —

1. That the plea of the said defendant, and the matters therein *contained are not sufficient in law for *350 him to use, keep, and enjoy the franchise and privilege of a ferry at the town of Dubuque.

2. That by the record, it appears that the judgment in form aforesaid was given against the United States on the relation of Jones, when it ought to have been given in behalf of the relator, &c.

3. The judgment should not have been rendered against the plaintiff for costs.

4. That the Court erred in the instructions to the jury, as set forth in the record below.

S. Hempstead, for plaintiff in error.

Davis, Rogers, Crawford & Berry, for defendant in error.

Per Curiam, Mason, Chief Justice. — The first question that arises in this case is in relation to the force and effect of the act of December 14th, 1838, granting a ferry charter to the defendant. It is contended by the plaintiff in error that the approval of the executive to that law is only conditional, and such as not to vest in the grantee the right which he claims; that it is not in accordance with the Organic Act, and consequently of no validity.

We think counsel are mistaken in this view of the case. The approval of the executive is absolute, unconditional. But the governor appends a note for the purpose of expressing a judicial opinion. He has said in effect, "I give this statute my approval, but still I regard the law in some respect as void, because it transcends the bounds of legislative power." He does not withhold his assent, but

merely expresses a doubt whether that assent will be of any avail for certain purposes. The note referred to is important to show the correctness of the legal opinion of His Excellency on this subject, but for no other purpose; a matter which is not material to the decision of this case.

An objection is made to the plea of the defendant, inasmuch as it does not allege that the act was *approved*, merely averring that it was *passed*. If this were an objection, it would lie equally against the information or declaration where the rights of the relator, Jones, are founded upon a basis exactly similar. But the objection is unsound altogether. An act is not "passed" by the legislature until it is duly *approved* by the governor who, *quoad hoc*, is a part and portion of the legislature.

The next objection which it will be necessary to notice is that raised by the appellant's counsel, that the leg-
*351 islature had no authority to *grant an exclusive privilege to Fanning; that the river is a public highway, and the landing upon the western shore of the river is forever reserved for public use by the ordinance of 1787, and the act of Congress of 1836.

Admitting all this to be true, it does not avail the appellant in this case. Had Fanning obtained an injunction to prevent Jones from ferrying across the river, this question would be more properly raised. But the present proceeding is for the purpose of compelling Fanning to show why he is exercising this privilege. If he is only doing what every citizen has a right to do, this would rather seem to be a sufficient answer to the complaint of the relator.

But the legislature has not exceeded its lawful powers in granting such a charter to the appellee. True, the Mississippi river, and all the navigable waters leading into it, are common highways, and must be for ever free. The legislature can make no law for obstructing the navigation of these streams.

But the establishment of public roads traversing the

country in various directions is a rightful subject of legislation, and the most judicious and effectual mode of establishing and keeping these in repair is a matter that is entrusted to the legislative discretion. The right to construct a road includes the power to provide for overcoming all obstacles in its course, as well those presented by a river as by any other object. A ferry (properly so called) is merely the continuance of a road across a river. It is only a substitute for a bridge.

Suppose a bridge should be resolved upon as the best mode of prolonging a road across a navigable stream. If made so as not to obstruct the navigation, the power of the legislature to authorize its construction is unquestionable. It is equally clear that the legislative power is competent to authorize the construction of such bridge by an individual or a company, with power to compensate themselves by taking toll. Nor will it, we think, be doubted that the legislature may, for the purpose of encouraging individuals to construct such bridge, grant them an exclusive privilege, to a reasonable extent, and prohibit all other persons from interfering therewith. The rule would be the same in relation to a ferry, which is a floating bridge. The granting of an exclusive privilege to establish such a public convenience within certain reasonable limits would be no violation of that provision of the ordinance of 1787, which declares the Mississippi and its tributaries common highways and forever free; provided, the navigation proper of the river be not thereby interfered with or obstructed.

*But it is contended that the right to navigate the *352 river crosswise is just as sacred as to do the same lengthwise, and that if an exclusive privilege can be granted to navigate between opposite points of the Mississippi, a like privilege might be given between Dubuque and Galena. To reason in this way, one has to lose sight of the evident object of the provision of the ordinance of 1787, above alluded to.

The Mississippi river is regarded in a very different light by persons under different circumstances. To the traveler by land it is a serious obstacle — to the proprietor of steamboats, one of the most valuable advantages. The object of the provision in the ordinance was to render sacred and free the facilities presented by the river — not to perpetuate impediments interposed by it to the traveler by land. It is only when it is *bona fide* for the purpose of overcoming such impediment that exclusive privileges are permissible, but never where the primary object is a monopoly of the benefits of navigation which it affords. If a person wished to use the buoyant power of the Mississippi river for the purpose of transporting heavy freights either longitudinally, or from one shore of the river to the other, and entirely unconnected with any public highway, the power of the legislature to interfere with his rights in this respect would certainly be questionable. The river in that case offers a facility for transportation of which he has the right to avail himself. The case here contemplated is very different from the prohibition of the establishment of an opposition bridge or ferry, which was actually intended to form part of a public land road.

A similar distinction to that here made is recognized in other cases. The right of the public to the freedom of navigating the Mississippi river is certainly no more sacred than that of an individual proprietor to the exclusive use of his own soil. The legislature would certainly have no power to take away a portion of that soil — either with or without compensation — and give to another individual or company the exclusive right to raise wheat or other product thereon. But they may grant away the right of establishing a public turnpike across the farm of any individual by remunerating him for the land taken; and they may also prohibit him or any one else, within a reasonable distance, from opening another road in a parallel direction which should be for the purpose or have the effect of in-

terfering with the exclusive privilege given to the proprietors of the public turnpike. At the same time the owner could not be prohibited from traversing his own premises in any direction, or allowing others to do so where such act does not come in conflict with the legitimate business of the public turnpike.

*The conclusion to which we are brought on this *353 subject, therefore, is that the Mississippi river, so far as it affords facilities for transportation, cannot be obstructed or monopolized. It is a common highway and forever free. But so far as it presents an obstruction to land carriage it is left to the sound discretion of the legislature to provide means for surmounting such obstructions by means of ferries, and that they may even for this purpose give individuals exclusive privileges within reasonable limits when done in good faith for the purpose of furnishing an indispensable link in the chain of transportation on dry land.

It is however contended that although an exclusive privilege might be granted to ferry across the river, such privilege would not extend to the landing in front of Dubuque, which by the act of Congress of 1836, are appropriated for "public highways and other public uses."

The above reasoning in the case of the river will apply with little variation to the Dubuque landing. Will it be contended that the fact of its being set apart for public use would prevent the legislature from authorizing a bridge across the Mississippi to terminate thereon? If intended to be used among other things for public highways, a portion of it is applied to its appropriate object when made the terminus of a highway leading through a portion of the State of Illinois and across the river. The right of appropriating it for public highways includes the right to employ any reasonable and ordinary means of rendering it more available as such. If necessary for the accomplishment of this object, the legislature have power to set apart a particular

portion as the termination of a bridge or a ferry, for these are the ordinary, if not the only, means by which an overland highway is to be continued across a navigable stream.

But it is admitted in the argument that the legislative power is competent to grant a ferry charter — the only objection being to its exclusive character. Is not this admitting away the whole of the present case? If Fanning has a right under his charter to keep a ferry, will an information in the nature of a *quo warranto* against him be available as a means of testing whether the law under which he is acting is valid to the full extent claimed. As well might this proceeding be instituted against a justice of the peace to show cause why he exercised the functions of his office, merely because our statute gave him jurisdiction where the sum claimed was $50 *exclusive of interest*, when by the Organic Act he is limited to cases where the whole sum claimed does not exceed $50. The fact that under the statute he claims to exercise powers which a paramount law has denied him, is no reason why he should not
*354 *exercise those powers that are legitimately granted.

This proceeding is proper for the purpose of ascertaining whether the respondent has not usurped or intruded himself into this franchise, but not for the purpose of giving shape, boundaries, and dimensions to the franchise itself. If, as is contended, the rights of the relator under his charter do not conflict with the lawful right of the respondent, under his, let the former proceed in the exercise of those rights, and when disturbed, let him then resort to the proper legal means of testing their respective rights; but the apprehension of being so disturbed will not justify the institution of a proceeding of this nature in anticipation.

As to the last point: that the Court erred in rendering costs against the United States, when they should have been rendered against the relator, although this may have been errroneous, we do not see how it could prejudice the

appellant. As no other party complains of this ruling of the Court, except the party most benefitted by the alleged error, we shall not disturb the judgment below on that account.

Judgment affirmed.

DAVID A. COUTCH and ORSON O. KINSMAN, plaintiffs in error, *v.* JOSEPH BARTON, defendant in error.

Error to Washington.

The Supreme Court will not consider an alleged irregularity in the Court below in omitting to dispose of a demurrer, unless the record shows that the demurrer was called up for the action of the Court (*h*).

The Court is only required to decide questions raised, and the neglect of a party complaining is never an available ground of error.

After a verdict, it is too late to raise an objection that pleas remain unreplied to, unless the defendant shows that he endeavored to obtain replications prior to the trial. The parties will be presumed to have gone to trial upon issues formed by general replications, traversing the special pleas.

This was an action of assumpsit instituted by Joseph Barton against David A. Coutch and Orson O. Kinsman, on a promissory note for $100, executed by the defendants below to J. G. Smith, by him assigned to Jesse D. Payne, and by him assigned to the plaintiff, Barton.

*At November term, 1842, judgment was rendered *355 for the plaintiff for the sum of $106.

(*h*) The rule established and frequently affirmed is, that the Supreme Court will not review or pass upon questions not presented to the Court below. Rev. § 3160; Schornner & Leiser *v.* Lynch & Clemens, 11 Iowa, 461; Peck *v.* Hendershot, 14 Iowa, 40; Cadwallader & Co. *v.* Blair, 18 Iowa, 420; Pigmen *v.* Denny, 12 Iowa, 396; McKinley *v.* Bechtel, 12 Iowa, 561; Downing *v.* Harmon, 13 Iowa, 535; Van Vark *v.* Van Dam, 14 Iowa, 232; Bethel *v.* Leay, 14 Iowa, 592; Decatur Co. *v.* Clements, 18 Iowa, 536; Berryhill *v.* Jacobs, 19 Iowa, 346.

The defendants below are plaintiffs in error.

The points raised may be found in the statement of counsel and in the opinion of the Court.

BATES, for plaintiff in error.

The record in this cause presents so many irregularities and errors, that a mere reference to some of the most prominent is all that will be attempted.

The demurrer to the plaintiffs' declaration was not disposed of by the Court, but as the defendant also pleaded to the said declaration, I shall not now notice the question raised by said demurrer. From the record it appears that the defendants pleaded three special pleas.

1. Fraud; setting forth the particulars of the fraud.

2. Fraud, generally.

3. Want of consideration, and averring notice thereof to the plaintiff.

The plaintiff filed something as a replication to two of the pleas, but waived this, as it seems by the record, and demurred orally to all of said pleas. And said pleas were holden good and sufficient in law to bar the action. The Court then ordered the said plaintiff to reply to the said pleas. The record further shows that the said plaintiff replied with a general traverse to defendant's first plea, which was non assumpsit, and then as to the other pleas, pleaded something which could not be read by the clerk, who sent up the original paper for the inspection of this Court. Be this what it may, it is pretty certain that it does not traverse each of the defendant's pleas so as to form issues of fact. It is believed that the author of it intended the principal part of it as a special demurrer to the second, third, and fourth pleas, and in this light I shall consider it. Calling it a demurrer, then, to the said pleas, it ought to have been disposed of before calling the jury to try the other issue joined, wherein the parties had put themselves upon the country. And the fact that said issues

in law tendered by this demurrer were not disposed of before the *issue of fact* was submitted to the jury, is error. 2 Blackf. R. 14, 34, note (2); 3 Blackf. R. 34, 131, 142.

If issue was not taken upon these pleas, or demurrers, and the counsel submitted the other issue to a jury, it was error. 2 Blackf. R. 292, Wright's S. C. R. 307, 524.

The jury was sworn to try the issue joined which was the plea of non assumpsit, and this issue was the one and the only one passed upon *by the jury; all the *356 other matters having been left undisposed of, whereby the defendants below claim that they were deprived of their legal defence to said action.

HALL & EVERSON, for defendant in error.

PER CURIAM, MASON, CHIEF JUSTICE.—The first error assigned in this case is, that the Court ought to have sustained the demurrer to the plaintiff's declaration. The record does not show that the said demurrer was ever called up for the action of the Court. Had the demurrer been overruled, or had the counsel for the plaintiff in error moved to have the demurrer considered previous to going into a trial of the issues of fact, his present objection would not have been out of place. But it is only the duty of the Court to decide questions which are raised before it, and the neglect of a party himself is never an available ground of error on which to ask a reversal of the judgment.

The second objection is, that several of the defendant's pleas were unanswered when the case was submitted to the jury. The proper answer to this is similar to that given to the first objection. The counsel for the defendant below do not seem to have made any effort to obtain a replication prior to the trial. After a verdict it is too late, at all events, to raise an objection of this kind. In a case like this the parties will be presumed to have gone to trial upon issues formed by general replications traversing the special pleas.

The 3d, 4th, 5th, 6th, and 7th assignment of errors have already been substantially answered, being in fact little else than repetitions of those we have just been considering.

The eighth assignment alleges that the verdict is insufficient to justify the rendition of the judgment. There appears to be no ground for this objection.

Judgment below affirmed.

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*357 *JESSE ROMAINE, plaintiff in error, *v.* THE BOARD OF COMMISSIONERS OF MUSCATINE COUNTY, defendants in error.

Error to Muscatine.

A joinder in error has the same effect on a motion to dimiss as the filing of a plea in the Court below; it waives all irregularity in the mode by which the defendant in error has been brought into Court (*i*).

The mere certificate of a person, not a sworn officer, is not a sufficient return to a summons; and if it was a service by copy, the return should state that it was left at the defendant's residence (*j*).

In the absence of any statute as to the service of a writ, it must be upon the person of the defendant. And where the statute provides a substitute, the mode prescribed by it must be complied with.

A judgment by default, or its equivalent, must be taken, before a jury can be impannelled to assess the damages (*k*).

This was an action of trespass brought by the board of commissioners of the county of Muscatine, trustees of a school section, against Jesse Romaine.

(*i*) The "joinder in error" has become obsolete under the Revision of 1860.

(*j*) As to the manner of proving service of process, see Rev. § 2823.

(*k*) See Rev. § 3151.

Jesse Romaine *v.* The Board of Commissioners of Muscatine Co.

Upon the summons issued and returned in this case, there was the following:—

"I hereby authorize George Hunt to serve the within summons according to law, for and at my risk.

"JAMES DAVIS, *Sheriff*, *M.*

"September 28, 1840."

"As per authority of James Davis, Sheriff of Muscatine county, I served the within, on the 26th day of September, by informing him, defendant, that I had a writ for him, he, the defendant, immediately fled from my presence, I then left a copy of the within in the care of Benjamin Brooks, he being a man person over the age of fifteen years, and said Brook's house being defendant's usual place of residence.

"G. W. HUNT.

"Returned October 14, 1840."

The defendant moved to quash the summons,—

1. Because it was not served upon the defendant according to law.

*2. That there had been no service upon the defend- *358
ant by an officer of that Court or any other person legally authorized.

Which motion was overruled.

Thereupon came a jury to enquire into and assess the damages, and a verdict and judgment was rendered for the plaintiff for sixty-eight dollars and ninety cents.

To reverse this judgment the defendants below sued out their writ of error.

Errors assigned:—

1. The original writ in this case was not served upon the defendant by the sheriff, or any person legally authorized to serve the same, in which there is error.

2. The Court overruled defendant's motion to quash the summons for reasons therein set forth.

3. The Court proceeded to hear and try the case by a jury without an issue.

4. There was no judgment by default taken, and the Court ordered a jury to enquire into and assess the damages.

5. The person who pretends to have served the process did not sign the sheriff's name, and did not serve the same in his name.

S. S. HASTINGS, for plaintiff in error.

"And now comes the board of commissioners of Muscatine county, and say that in the record and proceedings aforesaid, there is not error, and ask that the judgment aforesaid may be affirmed.

"R. P. LOWE, for defendant in error."

Afterwards the defendants in error moved the Court to strike this cause from the docket, because it had not been brought into this Court by either of the methods directed by law, and that for that reason the Court cannot entertain jurisdiction of the same.

BY THE COURT, JUDGE MASON.—A motion is made to strike this case from the docket, because it has not been brought up by either of the methods directed by law. The defendants in error have, however, appeared, and it is now too late to raise the objection. A joinder in error in this Court has, in this respect, the same effect as the filing of a plea in the District Court. It waives all irregularity in the mode by which the defendants in error have been brought into Court. Motion overruled.

*359 *PER CURIAM, MASON, CHIEF JUSTICE.—The service of the summons in this case was clearly defective, and there was no appearance to cure that defect. The return is dated October 14, 1840. We cannot find that at that

date there was any other than a personal service provided for. On the 31st of December, following, a law was passed authorizing a service by copy where the defendant cannot be found, but the return in this case was wholly irregular under that law.

In the first place the certificate of a person, not a sworn officer, is not a sufficient return; secondly, it does not appear to have been left at the place of residence of the defendant, but merely with Benjamin Brooks; and, thirdly, the contents of the writ do not appear to have been stated to said Brooks. In the absence of any statute on the subject, service must be personal. Where the statute provides a substitute, the terms and conditions of that substitute must be complied with.

Again, there was an irregularity in impannelling a jury to assess damages without a default (or its equivalent) being first taken. For either of these errors we think the judgment below should be set aside, and the case remanded for further proceedings; which is accordingly done.

ANSEL HUMPHREYS, plaintiff in error, *v.* GEORGE W. HUMPHREYS & Co. defendants in error.

Error to Muscatine.

If a defendant, on the back of a declaration filed against him, waves service of process, and agrees to enter an appearance at the first term of the District Court, he is estopped from a motion to dismiss the case for the want of a summons formally issued. And if the cause should be stricken from the docket, on the defendant's motion, for the want of the writ, and reinstated when the Court is afterwards advised of the waiver of service, it is not error (*l*).

(*l*) See also Acres *v.* Hancock, 4 Iowa, 568; Hefferman *v.* Burt, 7 Iowa, 820; Rev. § 2840, 8.

Ansel Humphreys *v.* George W. Humphreys & Co.

Where a defendant draws an order in favor of the plaintiff, under an agreement that the plaintiff shall not proceed in the collection of the money due to the plaintiff until the money is actually paid upon the order; if the money is not paid, the plaintiff can have judgment without delivering up or cancelling the order.

If the form of the oath prescribed by the statute, to be administered to a petit jury, is substantally complied with it is all that is requisite.

*360 *The errors assigned, and all the facts necessary to the understanding of this case, appear in the opinion of the Supreme Court.

LOWE & MATTOON, for plaintiff in error.

BUTLER & WHICHER, for defendants in error.

BY THE COURT, WILLIAMS, JUSTICE.—George W. Humphreys, John Humphreys, and Samuel Lucas, trading under the name and style of George W. Humphreys & Co. instituted their action in the District Court of Muscatine county, against Ansel Humphreys, to recover from him the amount due upon a promissory note, dated at Bloomington, in said county, on the second day of March, A. D. 1842, by which defendant promised to pay, one day after date, to the plaintiff, or order, the sum of one hundred and eight dollars and fifty cents, with interest at the rate of ten per cent, till paid. It appears by the record that defendant, by agreement in writing filed, waived "the service of a summons and agreed to enter his appearance at the first term of the District Court of Muscatine county." Upon the calling of the cause in the Court below, the defendant, by his counsel, appeared in the Court and moved the Court to dismiss the suit, and assigned for reason that "no writ of summons had been issued by the clerk in the case." Upon this motion the Court ordered the cause to be dismissed, but upon examination of the matter involved in the motion reinstated the action. In doing this it is alleged, by defendants counsel, that the Court erred. The

record shows that the attorney of the plaintiff made out and filed in the office of the clerk of the Court, a precipe for the issuing of a summons on the 18th day of May, 1843, in due form. After which, on the same day, the defendant made the following endorsement on the back of plaintiff's declaration duly filed in the case, viz :—

"MUSCATINE COUNTY, } ss.
"May 18, 1843. }

"I hereby waive service of process on the within, and agree to enter an appearance the first term of the District Court for the county of Muscatine.

"Signed ANSEL HUMPHREYS,
"by MATTOON, his Attorney."

By this endorsement the defendant, Humphreys, not only waived service, but agreed to make his appearance to answer at the next term of the Court for Muscatine county. Thus by his own act obviating the *necessity of issuing a summons in accordance with the precipe filed, thereby amicably placing himself in the position of a defendant in the action who had been fully and legally notified by summons. It would be unjust to suffer the plaintiff to be prejudiced by the motion to dismiss under the circumstances exhibited by the record. It was proper that the Court below should, upon full view of the circumstances, reinstate the cause. *361

The second error assigned is "That the defendants in error, in their amended replication, conclude to the country instead of the Court." It is true that where a plaintiff, by his replication to the defendant's plea, does not traverse or deny the facts set forth, or suggest matter in the plea in avoidance, he should conclude to the Court; but the pleading in this case does not justify this assignment of error. The replication of the plaintiff below traverses the facts presented in defendant's plea. This matter does not appear to have been suggested in the Court below. We discover no error in this point.

The third and fourth assignments of error relate to the same subject-matter contained in the bill of exceptions taken by defendant's counsel. We shall, therefore, consider them together. The proceedings and evidence exhibit the following state of facts: The plaintiff filed his declaration in the usual form on a promissory note as stated above. The defendant filed his plea of the general issue and also a special plea, in substance as follows; viz: That some time in the month of June, 1842, subsequent to the making of the promissory note declared upon, the defendant, at the instance and request of the plaintiffs, drew and delivered to him an order on R. P. Lowe, Esq. for the amount due on said note, to be paid to said plaintiff out of a claim then in the hands of said Lowe, as attorney for the defendant against D. J. Snyder, as soon as the same should be collected, which order was, on its terms, accepted by said Lowe. And further, it was expressly stipulated between the parties in said order on the said Lowe, "that the giving of said order shall not be a satisfaction of said note, nor in any manner hinder or delay the collection of said note in any way the holder might have done before the delivery hereof, until the money on this order is actually received by G. W. Humphreys & Co. and when so received shall be in full as above stated." This order, with the stipulation, was dated at Bloomington the 9th of June, 1842, and signed by Ansel Humphreys, the defendant. It was admitted on the trial below that this order was in the hands of the plaintiffs, and was not delivered up to be cancelled.

The defendant claimed that it should be delivered to
*362 be cancelled or given up *to the defendant before plaintiffs could recover on the note; but the Court instructed the jury "that the plaintiffs had a right to recover on the note without delivering up the order." To which instruction exception was taken. The decision of the Court below was made in accordance with the terms of the agreement made between the plaintiffs and the de-

fendant as expressed in the order itself, which was in evidence to the jury. The express stipulation of the defendant was that "The order should not be in satisfaction of the note, *nor in any manner hinder or delay the collection of the same in any way the holder might have done before the delivery hereof, until the money on this order is actually received by G. W. Humphreys & Co. on their order.*" The principle of the law relied upon by the defendant cannot avail in violation of his express agreement. The benefit of this position claimed was given up at the time of giving the order, and this formed one of the conditions upon which the plaintiffs took it. He cannot be allowed the right of making void his own legal order taken to the prejudice of the plaintiffs' right reserved by the agreement. He agreed that plaintiffs shall have the full right to proceed in the collection of the note without delay or hinderance until the money was *received by them on the order, in the same manner as he might before it was given.* We think the instruction of the Court below, on this point, was correct.

The fifth and last error assigned is in the form of the oath, which, by the record, it appears was administered to the jurors who tried the cause. The record of the cause has the verdict as follows: "Who being duly impannelled and sworn *the truth to speak upon the issue joined* between the parties, upon their oaths do say, we, the jurors, find for the plaintiffs," &c. The statute, in directing the form of the oath of jurors in civil cases, puts the form thus: "Well and truly to try the cause submitted to you by the plaintiff ———— and defendant ————." It would be error to depart substantially from the directions of the statute. Is the form here adopted in substance a departure from the terms of the statute? We think not. In trying, making, and delivering their verdict the jury were sworn "to speak the truth." The obligation the jury entered into by their oath comprehended *substantially* all that

is involved in the particular oath prescribed by the statute. We therefore find no error in this. Judgment affirmed, and *procedendo* to the Court below awarded.

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*363 *THOMAS S. BATTELLE, plaintiff in error, *v.* BRIDGMAN & Co., defendants in error.

Error to Muscatine.

Where a writ of error was sued out before the law required a writ of error bond to operate as a supersedeas, a change of the law would not operate upon the case so as to allow a dismissal of the writ. Nor would a change of the time of suing out the writ operate upon a case already in Court.

Although the confession of a judgment is a waiver of formal errors, it does not prevent the defendant from seeking to reverse the judgment confessed for errors of substance (*m*).

The only points decided in this case were on a motion to dismiss the writ of error, which are recited in the opinion of the Court.

WHICHER, for plaintiff in error.

LOWE, for defendant in error.

PER CURIAM, MASON, CHIEF JUSTICE. — In this case it is moved to dismiss the writ of error for the following reasons: —

1. Because no writ of error bond has been executed by the plaintiff in error.

2. Because the writ of error was not sued out within the time prescribed by law.

(*m*) Edgar *v.* Greer, 7 Iowa, 136; Troxel *v.* Clark, 9 Iowa, 391.

3. Because the judgment brought up by the writ of error was one of confession, and all errors released.

The first and second of the above reasons will be disposed of by observing that the writ of error was brought before the new law took effect. No bond was then necessary, unless the party wished to have the writ operate as a supersedeas. The law at that time also gave the party two years within which to bring his writ of error. It seems to have been brought within that time. The subsequent change of the law would not operate on a case already in Court.

As to the third reason above set forth for the dismissal of the writ, it is to be observed that, although the confession of a judgment is a waiver of formal errors, it does not prevent the defendant from objecting in this manner to errors of substance. If, for instance, the power of attorney authorized the entering up of a judgment for a *364 particular sum, and the *judgment should actually be entered up for a larger amount, is the party prevented from seeking a remedy in this way? Such, it is contended, is the case in the present instance. Motion overruled.

Joseph Bennett & Co. plaintiffs in error, *v.* James Davis, defendant in error.

Error to Muscatine.

A bill of exceptions filed after the writ of error will not be rejected if it was regularly taken, and there is nothing to show that it was taken and signed subsequent to the date of the writ.

The writ of error only brings up the errors existing at the time of its date (*n*).

(*n*) As to the office of a bill of exceptions, see Campbell & Bro. *v.* Ayres, 4 Iowa, 358; Redman *v.* Williamson, 2 Iowa, 488; Wright *v.* Keithler, 7 Iowa, 32; Anderson *v.* Ames & Co. 6 Iowa, 486; Platner *v.* Mofford, 1 Gr. 476.

Joseph Bennett & Co. *v.* James Davis.

The bill of exceptions is part of the record from the time it is taken.
A statement in a bill of exceptions that a certain order is made part of the bill does not make it so.
Bills of exceptions should show affirmatively that the Court below has committed an error.

This was an action of assumpsit, commenced before a justice of the peace, upon three promissory notes. The defendant pleaded payment by an order drawn on D. J. Snyder for $31.10. Judgment was rendered for the plaintiffs for thirty dollars and twenty-nine cents, and the cause removed to the District Court by *certiorari*. A trial was had, and a verdict rendered for the defendant.

On the trial the defendant offered in evidence the order on file, which is alluded to but not embodied in the bill of exceptions, but which, from the record, appears to be in the following words: —

"D. J. SNYDER, ESQ. — Sir, you will please pay to J. Bennett & Co. thirty-one dollars and ten cents out of the first moneys you collect for me out of the moneys due me on the District Court docket of Muscatine county, not otherwise appropriated, and I will receipt to you for the same on the docket.

"Bloomington, October 24, 1842.

"JAMES DAVIS.

Endorsed, "Accepted, October 28th, 1842.

"D. J. SNYDER."

Together with testimony tend to prove that the order *365 was taken *by plaintiffs on account of the notes in suit. And on the part of the plaintiffs it was shown that the order was tendered back to defendant on the trial before the magistrate, and placed with him for defendant. Upon this evidence the plaintiff's counsel requested the Court to charge the jury that plaintiffs were entitled to recover on the notes. But the Court declined thus to charge, without charging at the same time that the

plaintiffs were bound to return the order in a reasonable time, and that the jury were to judge of that. To which the plaintiffs excepted.

Also upon the trial and while the plaintiffs counsel was making the opening argument to the jury, they moved the Court for leave to introduce the testimony of Arthur Washburn, to prove that the order above referred to, was tendered to defendant without delay, and before the commencement of the suit, which was overruled by the Court. To which the plaintiff excepted.

The case was removed to this Court by writ of error.

HASTINGS, counsel for defendant in error, moved the Court to strike from the bill of exceptions the first exception alleged to have been taken therein.

1. Because the testimony is not recited therein.

2. Because the bill does not allege that the testimony alluded to was the whole testimony in relation to the notes and orders on the trial of this cause.

3. An order is alluded to in said exceptions and was not set out.

And the said defendant moved to strike the whole bill of exceptions from the record, because it appeared from the statement of the Hon. Joseph Williams, Judge of the 2nd judicial district, before whom this cause was tried, that the said bill of exceptions was allowed after the term of the Court at which this case was tried.

THE COURT.— A motion is made in this case to reject the bill of exceptions on the ground that it was filed after the writ of error was sued out. The writ of error is dated the 25th day of December, and the bill of exceptions filed on the 29th of the same month. If there were anything to show that the exceptions had been taken and the bill signed on the day last mentioned, it ought to be rejected. The writ of error only brings up the errors existing at the time of its date.

But our statute declares that the bill of exceptions from the time it is signed and sealed shall become a part of the record. It is not requisite for this purpose that it *366 should be formally filed with the clerk. The *bill of exceptions in this case seems to have been regularly taken and signed. At least there is nothing to contradict such a conclusion. It comes up as a part of the record and therefore ought not to be rejected.

Motion overruled.

Errors assigned :—

1. The Court erred in declining to charge the jury the particular matter asked for by plaintiffs' counsel.

2. In overruling the motion of plaintiffs' counsel for leave to introduce the testimony of Arthur Washburn.

3. In not swearing the jury well and truly to try the issue joined between the parties, and a true verdict render according to the law and the evidence given therein.

4. In rendering judgment in this case.

5. In overruling plaintiffs motion for a new trial.

MATTOON, for plaintiff in error.

HASTINGS, for defendant in error.

PER CURIAM, MASON, CHIEF JUSTICE.—The first and principal matter relied on as error in this case, is the refusal of the Court to charge as set out in the bill of exceptions, which reads as follows :—

"Be it remembered, that on the trial of this cause, at the present term of this Court, the defendant offered in evidence the order on file (which is made part of this bill), together with testimony tending to prove that the order was taken by plaintiffs on account of the notes in suit. And on the part of the plaintiffs it was shown that the order was tendered back to defendant on the trial of this cause before the magistrate, and placed with him for de-

fendant. Upon this evidence the plaintiffs' counsel requested the Court to charge the jury that plaintiffs were entitled to recover on the notes, but the Court declined thus to charge without charging at the same time that the plaintiff was bound to return the order in a reasonable time, and that the jury were to judge of that."

There is certainly not enough set forth here to show error on the part of the Court. The nature and amount of the order here referred to no where sufficiently appears. It is true that among the papers of the case is the copy of an order that seems to tally with that here referred to, but there is no evidence to show that it is the same. The statement in the bill of exceptions that this order is made a part of the said bill does not make it so.

But again, the bill of exceptions states that certain facts were proved, *but does not state that other and *367 different facts were not also proved. We certainly cannot say that the Court below erred in its charge, while we are ignorant of the entire basis upon which that charge was founded. Probably, it is true, the facts set forth in the bill of exceptions are all that were proved bearing upon the point under consideration, but we cannot say that such was the case. Counsel have the right to draw up bills of exceptions and if they embody only truths, the Court is required to sign them, and they then become a part of the record. As a matter of justice then, such bills of exceptions should be required to make out a complete case and show affirmatively that the Court below had committed an error. Such is not the case in the present instance. We need not, therefore, determine whether the position taken by the counsel for the plaintiff in error on the point raised and stated by him is or is not tenable. It is not properly raised.

The answer to the other points made is so evident as not to call for further consideration or comment.

Judgment affirmed.

JOHN WARBURTON *et al.* v. EDMUND MATTOX *et al.*

Appeal from Dubuque.

A mortgage duly executed and recorded is notice to all the world of the interest conveyed

If there is a second mortgage on the same property, the second mortgagee must be regarded as knowing at the time he receives his mortgage of the previous mortgage, if the same is recorded.

If A mortgages a tract of land to B, while the title to the same is in the United States, and afterwards C purchases the same land from the United States, conveys it to A, who again mortgages the land to D, the title thus thrown upon A enures to the benefit of B, the first mortgagee, who will be preferred to D, the second mortgagee, who is a purchaser with notice of an outstanding mortgage of record (*o*).

This was a bill to foreclose a mortgage, filed by John Warburton, Hezekiah King, Job P. Doan, and Wyllis King, complainants, against Edmund Mattox, William Smith, and James Sloan, defendants.

The bill was filed April 1, 1841; and sets out that Edmund Mattox, on the 24th March, 1841, being indebted to them, in the sum of eight hundred and ninety-five *368 dollars and *fifty-four cents, executed to complainants his note for the payment of the same, in twelve months from date, with interest at the rate of ten per cent until paid. That to secure the payment, he also executed a mortgage on certain property in Dubuque, which is made an exhibit to the bill; that this mortgage was by deed with covenants of warranty, &c.

The bill also alleges that subsequently to the above mortgage being executed to them, and recorded, the defendant, Mattox, also executed mortgages on the same property to the defendants, Smith and Sloan.

It prays for the foreclosure of the equity of redemption

(*o*) To the same effect, see Rev. § 2310.

against all the defendants, and a sale of the property to pay the debt.

The defendants, Smith and Sloan, in their answer do not deny the execution of the mortgage to the complainants, but allege that Mattox purchased the property subsequently to his mortgage to complainants, and insist that their mortgages are a prior lien to that of the complainants.

The cause was heard upon bill and answer, and the parties admitted the due execution and recording of the several exhibits to bill and answers.

On the 23d February, 1842, the Court below rendered a decree for the complainants for one thousand sixty-five dollars and forty-four cents, and in default of payment in ten days from the date of the decree, that the property should be sold, &c.

From this decree Smith and Sloan, two of the defendants, appealed to this Court.

Timothy Davis, for complainants.

In support of the decree it is insisted that Smith and Sloan took their mortgages subject to the lien of the complainants. They stand in the light of purchasers with notice, and the notice they have not denied. The defendant must deny all notice, even though it is not charged; otherwise he will not be deemed a *bona fide* purchaser. 2 Johnson's Chan. 155; Fonblanque's Equity, 444; Registry acts of Iowa.

Mattox's subsequent purchase of the lot enured to the benefit of the complainants. See Statutes of Iowa, 1840, page 35. Also the rule that A, selling of land with warranty, having no title, and afterwards acquiring a title, it enures to the benefit of his grantee. 16 Pick. 416; 3 Pick. 59.

Berry, for defendants.

Mattox had no title to the premises in question at the time of the execution of the mortgage to the com-
*369 plainants. The legal title is in *Smith; and where there is equal equity, the maxim is, the legal title shall prevail. 1 Story Com. on Equity, 75; see also the opin- of Attorney Gen. Butler, 2 vol. Land Cases, page 82. The title subsequently acquired by Mattox does not enure to the benefit of the complainants. 1 Cowen, 711; 4 Wendell, 300; 14 J. R., 91; 1 Paige's Chan. Rep. 473.

The answer of Smith must be taken as true, because the case comes up on bill and answer, which fact shows the equity to be equal.

The state of the pleadings show no notice to Smith of the mortgage of the defendants. The act of registration, under the laws of the territory of Iowa, was no notice to the subsequent mortgagee. 1 Story 393, because not known to the laws of the United States.

Per Curiam, Mason, Chief Justice. — The mortgage from Mattox to the complainants was executed on the 24th of March, 1840, before the title of the land was obtained from the United States, and it was duly recorded, as appears by the admission of parties. On the 4th of April following, Fassett & Sherman entered the land at the land office, and on the 7th of the same month, conveyed the same to Mattox. On the 15th of the same month, Mattox mortgaged the same land to Smith, and on the 12th of November following, to Sloan, the other defendant.

What is the effect of recording such a mortgage as that given to the complainants? The thirtieth section of the act to regulate conveyances (laws of 1840, page 39) declares that the recording of such instruments shall impart notice to all the world of the contents thereof. The defendants, Smith and Sloan, must therefore be regarded as knowing at the time they received their respective mortgages that this previous mortgage had been executed to the complainants, under the circumstances above stated.

It will become necessary, therefore, to inquire into the nature and effect of the mortgage itself.

It states, among other things, that the party of first part "does *grant, bargain and sell* unto the other said party of the second part," &c. The sixth section of the act to regulate conveyances (laws of 1840, page 36), defines the effect of such a clause in an instrument of this nature, as importing the following covenants: first, that the grantor had a fee simple title; second, that it was unincumbered; and, third, for further assurance.

A mortgage, therefore, containing all these covenants, was executed by Mattox to the complainants, while as yet he had no title. He afterwards acquired title and subsequently mortgaged the same premises to Smith and Sloan; they being fully informed of the aforementioned circumstances.

*Much stress was laid upon the fact that at the time *370 of the first mortgage, the title was in the United States. I conceive this is not material. The important fact is that it was not then in Mattox. It matters not where else it was.

It is also contended that inasmuch as the defendant, Mattox, had no title when he executed the mortgage to the complainants, the registry thereof was no notice. It is true that the registry of a deed not required by law to be registered, is not notice to all the world. 1 Story, 404. I think, however, this case does not fall within the rule. This is clearly such an instrument as the law contemplates. I find nothing in the statute excluding cases of this nature from the benefits of the law relative to the effect of a registry. It provides that "Every instrument in writing that conveys any real estate, or whereby any real estate may be affected *in law or equity*, proved or acknowledged, and certified in the manner above prescribed, shall be recorded, &c." Laws of 1840, page 39, § 29. This is clearly such an instrument as may affect real estate "in law or equity,"

and therefore comes within the scope of the registry law.

If a deed of warranty, therefore, be executed and duly recorded, while the grantor has no title, and full title be subsequently acquired by him, this enures to the benefit of the grantee. The registry also protects him against all subsequent purchasers. But if the deed were a mere quit claim, the subsequently acquired title would not enure to the benefit of the grantee in the quit claim deed, and consequently a registry of such deed would not prejudice the rights of a subsequent purchaser.

Is the mortgage to the complainants to be regarded in this particular as a quit claim or deed of warranty? I think the latter, unquestionably. We have seen that this mortgage contains what is tantamount to express covenants of full unincumbered title in the grantor, and also, for further assurance. Whether this is sufficient to vest him with a legal title upon Mattox subsequently obtaining the fee simple, is immaterial. At least the mortgagees have an equity superior to that of the defendants, Smith and Sloan, who took their respective mortgages with full knowledge of the rights of the complainants. See 1 Pow. on Mortgages, 190.

I therefore think the decree in this case should be affirmed.

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*371 *David Clark, plaintiff in error, *v.* Josiah Parvin, defendant in error.

Error to Muscatine.

A bill of exceptions, signed by bystanders at the trial, must state affirmatively the points reserved, and not what they *understood* to be the judge's charge. And it must be drawn up and signed at the time (*p*).

(*p*) See Rev. 3110; Simon *v.* Weigel, 10 Iowa, 505.

David Clark *v.* Josiah Parvin.

On the trial below, a bill of exceptions was tendered, which the judge declined to sign, as he did not consider that he had charged as stated by the exceptor. It was then certified to, as follows: —

"The undersigned were present at the above trial and understood the Court to charge and refuse to charge as stated above.

"J. SCOTT RICHMAN,
"A. WASHBURN,
"J. B. BARKER."

The defendant moved to reject the bill of exceptions: —

1. Because the same was not filed till some days after the trial.

2. That the exceptions do not appear to have been taken at the trial.

That said bill is not signed and sealed by the judge.

4. It does not appear whether the bystanders signed the bill at the trial or some days after.

WHICHER, for plaintiff in error.

WOODWARD, for defendant in error.

PER CURIAM, MASON, CHIEF JUSTICE. — A motion is made in this case to reject the bill of exceptions, on the ground that it is not taken and signed in the manner prescribed by law. The objection appears to be well taken. It is signed not by the judge, but by three persons who were present at the trial, who merely state that they *understood* the Court to charge as therein set forth. The trial moreover took place on the 28th day of June, and the transactions in relation to the signing and filing the bill of exceptions appear to have taken place on the 2d day of July. Where a bill of exceptions is thus signed by bystanders, the statute should be strictly complied with. It should be drawn up and signed at the time of the trial.

A party will not in such cases be permitted to wait
*372 four days and then procure three persons to *state what they *understood* the Court to charge, in opposition to the recollection of the judge who tried the cause. The motion to reject will, therefore, be sustained.

SILAS W. FARBER AND OTHERS, plaintiffs, *v.* ALEXANDER LEVI, defendant.

Appeal from Dubuque.

Where a copartner in the right of pre-emption to a lot of land neglects or refuses to join his copartner in presenting their claim before the board of commissioners for allowance, the heirs of the negligent and refusing partner, after his death, cannot come into a Court of equity against the surviving partner for a division of the lot which he has secured to himself.

The decision of the town commissioners of Dubuque, in the adjudication of pre-emptive claims, is not final and conclusive, nor subject alone to the revision of the commissioner of the general land office. Should their decisions have been obtained by fraud or mistake, relief may be had in a Court of equity.

This is a bill in chancery, filed by Silas Farber, Elizabeth Burbridge, William K. Burbridge, Eliza J. Burbridge, John Burbridge, Clinton D. Burbridge, and Jane Burbridge, complainants, against Alexander Levi, defendant.

The case presented by the petition was, that Levi and Benj. Burbridge, deceased, through whom the petitioners claimed, agreed to purchase the property in litigation, in 1835, of one Henry Potzer. That the purchase was left to Levi to make, and that instead of taking a conveyance in their joint names, he took it in his own name, and that they made an equal contribution of the purchase money.

That in April, 1836, Burbridge, the ancestor discovered that Levi had taken the conveyance in his own name, and

demanded from him a conveyance of the undivided half of the lot. Wherenpon Levi executed the same, April 3, 1836. That in January, 1838, Burbridge died. That in his lifetime he and Levi made valuable improvements on the lot jointly, with joint funds, and on joint account, worth more than $1,200.

That at the date of the deed from Levi to Burbridge, and while the improvements were making, the title was only by pre-emption That *after the death of Bur- *373 bridge, Levi being only entitled to an undivided half of the lot, fraudulently represented himself as entitled to the whole, to the board of commissioners to ascertain the claimants to pre-emptive rights, as assignee of Potzer. That he obtained the pre-emption under said claim to the whole lot, and entered it in his own name.

The complaints charged that Levi had occupied the lot afterwards to their exclusion, received large amount of rents, &c. and prayed that Levi might be decreed to convey to them the undivided half, and that he account for half of the rents received.

The answer of Levi admitted the purchase from Potzer by Levi, but denied that it had been upon joint account. It admitted the sale from defendant, Burbridge, as stated, but insisted it was only the interest defendant had at the time in the lot; that at the time of sale there were no pre-emption rights to lots, &c. Defendant admitted that he applied for the pre-emption in his own name as assignee of Potzer, and obtained it before the commissioners; that, under his certificate of pre-emption he was permitted to purchase the lot in the land office, and claimed the entire interest in the lot by virtue of the purchase.

The answer further states that defendant applied to Burbridge in his lifetime to join with him in applying for a pre-emption, but that Burbridge declined to do so.

The additional facts presented by the answer, replication, and depositions, necessary to an understanding of the case, are contained in the opinion of the Court.

The bill was dismissed in the Court below, and the complainants appealed to this Court.

DAVIS & CRAWFOD, for complainants.

BERRY, for defendants.

PER CURIAM, MASON, CHIEF JUSTICE.— This was a petition filed by the representatives of Benjamin Burbridge, to obtain one-half of a lot of ground in the town of Dubuque, and an accounting for the rents and profits of the same for several years past. It sets forth that Burbridge and Levi agreed to purchase the lot (it then being government land) from one Potzer, each advancing one-half the purchase money; that Levi fraudulently took the deed in his own name, but afterwards executed a conveyance of one-half to Burbridge; that when the commissioners sat to adjudicate upon pre-emption rights in the town of Dubuque, Levi, by presenting to them the deed from *374 Potzer, fraudulently obtained their *certificate to himself in his own name, and ultimately entered the lot at the land office. During the pendency of the proceedings before the commissioners aforesaid, Burbridge died, and Levi afterwards received the whole of the rents and profits of the property, including the lot and a building which they had jointly erected.

The case, as set forth in the petition, is such as clearly to entitle the complainants to relief, unless their rights have been forfeited by their own negligence or by that of Burbridge. We do not adopt the conclusion of the defendant's counsel that the decision of the town lot commissioners is final, subject only to the revision of the commissioner of the general land office. Those commissioners constituted a judicial tribunal, and as such their decisions are to be respected; but where those decisions have been obtained by fraud, or by mistake, we know of nothing that should prevent the same remedial interference of a Court

of equity that is exercised in relation to other legal decisions.

But relief must be obtained, if at all, in both cases, upon similar principles. The party claiming it must show, among other things, that he used all reasonable exertions to obtain justice in the other Court, or furnish a sufficient excuse for his negligence. How was it in the present case?

The complainants made no efforts to obtain justice at the hands of the commissioners, but they set forth in excuse, first, that Burbridge was dead; next, that they were ignorant of their rights, some of their number being minors; and, finally, that Levi falsely and fraudulently presented to the commissioners his deed from Potzer, and obtained their certificate for the whole lot, when in justice he was only entitled to an undivided half of the same.

Had all these allegations been proved, then the complainants would have presented a strong case for relief, but the proof turns out widely different. Burbridge, it is true, died in January, 1838, but some months previous the commissioners had been in session, and all those interested had been notified to file their claims. Burbridge was in Dubuque at different times in the summer of 1837; and once late in the fall of that year. He must have known of the pendency of proceedings in relation to town lots, and of the necessity of taking steps to secure his rights thereto. Chilton, the administrator, was also aware of the state of affairs in relation to this property, but instead of joining with Levi in obtaining each one-half of the lot, as requested, stated that, as administrator, he had sold the interest of the heirs to Thompson.

But the answer of Levi, so far as it is responsive to the petition, is *evidence in the case; and he states, *375 in answer to the statements, that he had fraudulently and falsely procured the certificate from the commissioners to himself, and that the complainants were ignorant of

their rights in the matter, that he had always solicited Burbridge to join with him in obtaining a joint pre-emption, and after his death he made a like application to Chilton, who both declined joining in making the necessary application.

But the case is still stronger against the complainants. Thompson states that he filed a claim in opposition to that of Levi; that this was purchased with the funds of the partnership firm of Thompson, Burbridge & McClune; that Burbridge knew of the purchase and did not object to it, and that the application was filed in the fall of 1837, and for the benefit of the firm. According to the other testimony, Burbridge must have been in Dubuque subsequent to such application having been filed. It seems reasonable to conclude from all these facts that Burbridge knew of the nature of Thompson's application, and countenanced the same. Burbridge and his co-partners then endeavor to defeat the claim derived through Levi's purchase from Potzer. Not satisfied with refusing to aid Levi in sustaining this latter claim, he joins in setting up one antagonistic thereto; strives to deprive Levi of all of his rights under the Potzer purchase, and when, in spite of all these efforts, Levi has been successful, his heirs claim to share that success which he and they had not only neglected to promote, but had endeavored to prevent. They certainly have no claim for relief in a Court of Equity. The decree of the Court below will, therefore, be affirmed.

James M. Clark *v.* John O'Loughlin.

JAMES M. CLARK, for the use of Louisa County, plaintiff in error, *v.* JOHN O'LOUGHLIN, defendant in error.

Error to Louisa.

A defendant to an action on a promissory note given in part payment of a lot of land cannot resist the payment on the grounds that the title bond of the vendor contains a reservation that the first installments shall be forfeited, and the contract of bargain and sale rescinded if the remaining notes are not paid when due (*q*).

*The vendee cannot disaffirm the contract if the vendor proceeds *376 to enforce the collection of the notes. He binds himself absolutely by the execution of negotiable notes.

This was an action of debt on two promissory notes given by defendant to plaintiff. The cause was tried at the June term, 1842, of the Louisa District Court, Judge Williams presiding, and a judgment rendered for defendant upon an agreed state of facts. The plaintiff below is plaintiff in error.

THOMAS & LOWE, for plaintiff.

The facts in this case will appear from the following described bond offered by defendant below, and from the terms of which defendant contended that judgment should be rendered in his favor, which was done.

The bond recites that said plaintiff, as commissioner for the sale of real estate for Louisa county, agrees to sell to to said defendant certain town lots in Wapello, the county seat of said county, in consideration of the sum of $318. It also acknowledges the receipt of one-eighth of the

(*q*) Brink *v.* Morton, 2 Iowa, 411; Ring *v.* Ashworth, 3 Iowa, 452; Armstrong *v.* Pierson, 5 Iowa, 317; Young *v.* Daniels, 2 Iowa, 126; Matthews *v.* Gillis, 1 Iowa, 242; Crawford *v.* Paine, 19 Iowa, 172; Lavesty, *v.* Hall, 12 Iowa, 386.

money, and then states that three notes, of $92.75 each, were executed by defendant to plaintiff, payable in six, twelve, and eighteen months from the date, being June 18, 1839.

The bond is then conditioned that should the said several notes be punctually paid when due, then, upon the payment of the last note, the said plaintiff and his successors in office are bound to make to said defendant a deed, &c.; but should defendant fail to pay either or both the first two notes when due, he shall pay twenty per cent upon the money due until paid, and should he fail to make full payment of all the notes when the last becomes due, with the interest thereon as aforesaid, then the said lots shall revert to the county, and the said purchaser forfeit "such sums of money as he may have paid on said lots."

On the first two notes above mentioned, each drawing twenty per cent interest from maturity, and before the maturity of the third mentioned note, the above suit was commenced in debt.

The plaintiff contends that the Court below, in giving judgment for defendant on the grounds that he might rescind said contract, erred; and that the provision in said bond that, in case defendant failed to pay the first two notes when due they should draw twenty per cent interest till paid, and that in case he failed to pay all the notes when the last became due, with the twenty per cent interest on the first two notes, that the moneys paid should be forfeited and the lots remain in the county, was simply for the benefit of the vendor, and as an inducement *377 *to defendant to pay said notes promptly, or at any rate, when the last one became due; and that in case of defendant's default, that then the plaintiff might consider the contract void at his own election, or affirm it and sue upon the notes. See Campbell & Crane, Er. *v.* Westcott, 5 Cowen, 270, where articles for sale of lands by which the vendee covenants to pay, and the vendor covenants to

convey on payment, and the vendee agrees that if he fails in his covenant, the contract shall be void. In an action by the vendor for the money, no part having been paid, it was held that the action lay, the contract being void only at the election of the vendor.

Learned, Grimes & Woods, for defendant.

Per Curiam, Mason, Chief Justice.—This suit was brought on two promissory notes given by the defendant to the plaintiff for the use of the county of Louisa. Certain town lots were sold by Clark, as agent for the county, to O'Loughlin, upon the following terms: one-eighth in cash down (which amount was paid accordingly), the remainder in three equal installments, at periods of six, twelve, and eighteen months, for which O'Loughlin gave his promissory notes. It was further agreed that upon the payment of the whole purchase money, he was to receive a warranty deed; but if he should fail to pay either of the two first notes when due, they were to draw twenty per cent interest from that time until paid, and if he should fail to make full payment of all the notes, when the last became due, with the interest thereon, that then the said lots should revert to the county, and the purchaser should forfeit such sums of money as he might have paid thereon. The present suit was brought on two of these notes before the third fell due.

The only question in the case is to determine the legal effect of this contract. Had the defendant the right to forfeit all he had paid, and thus exonerate himself from further liability; or was the enforcement of the forfeiture left to the option of the plaintiff? We think the latter is clearly the case. The contract consisted of two parts. The defendant gave his promissory notes absolute on their face, which, by the law of this territory, might be negotiated, and, in the hands of an assignee, would, at all events, have

been collectible. That fact of itself would seem sufficient, in the absence of contrary proof, to show that the defendant intended to bind himself absolutely to pay the money. He then takes a bond from the plaintiff, with the conditions above set forth. Suppose suit had been brought on the first note as soon as it became due, must the plaintiff wait till the maturity of the last note to ascertain *378 whether *the defendant is then going to fail to make payment and suffer a forfeiture of what he has paid, or may he obtain judgment immediately? Certainly the latter. The same may be said also of the second note. The plaintiff then clearly had a right of action in relation to these notes, as soon as they became due, and if he recovers judgment before the maturity of the third note, that judgment will be certainly valid. Will the delay in obtaining judgment until after such maturity divest a right valid until that time? We can give no satisfactory interpretation of this contract, otherwise than by regarding it as absolute on the part of the defendant, that he will pay the money when it becomes due. If not so paid, a suit may be brought therefor. And if unpaid at the maturity of the last note the plaintiff may regard the land as reverting, and the amount paid as forfeited; or he may waive his right of reversion and bring suit on the notes. At all events on the two set forth in the declaration in this case.

We think, therefore, the decision in the Court below was erroneous. Judgment will, therefore, be rendered for the plaintiff, according to the agreement of counsel in this case, and the clerk will be directed to assess the damages.

Daniel Meigs *v.* Stephen B. Parke.

From Jefferson.

Where a rule of practice is changed by statute without any saving clause, the new law is applicable to all cases then pending (*r*).

The act of 1840, limiting costs in certain cases, for slander, &c., applied to suits commenced previous to the taking effect of that act, if terminated subsequently.

A jury cannot award cost where the legislature has prescribed the costs incident to the damages assessed.

By agreement of parties, this cause is submitted to the Supreme Court upon the following statement: —

"The writ of summons was issued, and the declaration filed, 18th January, 1841; appearance term commenced 6th April, 1841. On the 31st December, 1841, an act of the legislature was approved, to take effect from the 3d March following, which provides 'that in all actions of tort, brought originally in any of the District Courts of this territory, *if the plaintiff recover less than *379 fifty dollars, he shall recover no more costs than damages.'

"The defendant pleaded,—

"1. The general issue; which, before trial, by the leave of the Court, he struck out and abandoned.

"2. The truth of the words charged, in justification, to which the plaintiff replied '*de injuria, &c.*,' upon which issue alone the cause was submitted to the jury, who found for the plaintiff 'ten cents damages and costs of the suit,' and were discharged from further consideration of the case. Thereupon the defendant insisted that the Court ought to render judgment against the defendant for ten cents dam-

(*r*) See Rev. §§ 29, 33, 34, 35; Ballard *v.* Ridgley, *ante*, 27; Sleeth *v.* Murphy, *ante*, 321; Wade *v.* Carpenter *et al.* 4 Iowa, 361; Thatcher *v.* Haun *et al.* 12 Iowa, 303; The State of Iowa *v.* Shafer, 21 Iowa, 486.

ages and ten cents costs, notwithstanding the verdict gave full costs to the plaintiff; because he said the jury could find *damages* only, and had no power or discretion to award costs; and that the statute above mentioned, which he insisted was applicable to this case, would allow the plaintiff, for costs, but ten cents as a legal incident to a verdict of ten cents damages. The plaintiff, however, insisted that he ought to have judgment for the ten cents damages found by the jury, and also his full costs.

"1. Because the statute aforesaid did not apply to causes commenced before the statute took effect, and therefore judgment for full costs was in such cases incident to a verdict of ten cents damages.

"2. Because if the statute aforesaid did apply to this case, the jury might nevertheless award costs as a part of their verdict.

"But because the Court was of the opinion that the plaintiff upon that verdict could have judgment for only ten cents costs, the plaintiff moved for a new trial, which was granted to him, and thereupon the cause was continued to the next term of the Court, when it was again continued to the April term, 1842.

"The defendant, however, excepted to the opinion of the Court in sustaining the motion for a new trial, and his bill of exceptions was made part of the record.

"Now, first, if the Supreme Court are of the opinion that the Court below ought to have rendered judgment upon that verdict in favor of the plaintiff against the defendant for ten cents damages and all the costs of the suit, according to the finding of the jury, then the cause is to be remanded to the District Court, with instructions accordingly to render such judgment, and the plaintiff in that case abandons the new trial aforementioned. But if the Supreme Court are of the opinion that the Court below,

upon that finding, ought to have rendered judgment
*380 for ten cents damages *and only ten cents costs against

the defendant in favor of the plaintiff, the said Supreme Court are then to consider: Secondly, whether, if a new trial had taken place, and on such new trial verdict and judgment had gone against the defendant for fifty dollars, and all costs, and assigned for error the granting of the new trial aforesaid, the Supreme Court would have regarded that as an error, and reversed the judgment on that account, and rendered judgment or remanded the cause to the District Court, with instructions to render judgment upon the first verdict for ten cents damages and ten cents costs in favor of the plaintiff. And if the Supreme Court are of the opinion that such would have been the result, the case is to be remanded, with instructions to render such judgment in the Court below in favor of the plaintiff against the defendant for ten cents damages and ten cents costs. But, third, if the Supreme Court are of the opinion that judgment ought to have been rendered upon the former verdict in favor of the plaintiff against the defendant for ten cents damages and only ten cents costs, notwithstanding the jury found full costs for the plaintiff, and notwithstanding the statute aforementioned took effect after the commencement of this suit; and are also of the opinion that the granting of the new trial would not (as in the case above supposed) be error to reverse the judgment to be rendered upon the finding of the jury on such new trial, then the cause to be remanded to the District Court, with instructions to proceed with such new trial.

"CYRUS OLNEY,
Attorney for plaintiff.
"SAMUEL SHUFFLETON,
Attorney for defendant."

Per Curiam, Mason, Chief Justice.—This case does not come properly before us, for there has been no final judgment below. It is, however, brought here by mutual consent, and as the questions raised present no particular

difficulty, we have concluded to decide such of them as relate to the past action of the Court below. The first of these is in reference to the decision of the District Court, that the act of 1840, limiting the costs in certain cases applied to suits commenced previous to the taking effect of that act, if terminated subsequently. This we think was correct. Where a rule of practice is changed by statute without having any saving clause, we have always regarded the new law as applicable to all cases then pending. This rule is applicable to the case now under consideration.

The Court was right, too, in disregarding the verdict
*381 of the jury, so *far as that verdict would operate to repeal the statute, or render it inoperative upon the case. The jury overstepped their legitimate limits when they undertook to regulate the subject of costs, which had already been arranged by the legislature. As well might they have declared that there should be a longer stay of execution than the law had provided. The form of the verdict was a legitimate argument to be addressed to the discretion of the Court for the purpose of obtaining a new trial, but could not have justified the Court in disregarding a positive statute. The case will, therefore, be remanded to the District Court of Jefferson county, for further proceedings therein.

WILLIAM LONG, plaintiff in error, *v.* GABRIEL LONG, for the use of Jesse D. Walling, defendant in error.

Error to Muscatine.

Where a cause is still pending in the Court below, the Supreme Court will not entertain a question brought up by consent of parties.

William Long *v.* Gabriel Long.

It is not the province of the Supreme Court to give advice to the District Court (*s*).

Gabriel Long for the use of Jesse D. Walling had sued William Long in an action of debt, and a judgment was rendered for the plaintiff at the June term, 1839, and the case was taken to the Supreme Court and reversed at the July term, 1840, and a new trial ordered. The opinion of the Court and writ of *procedendo* were filed in the clerk's office September 13, 1841. At May term, 1843, the defendant moved the Court to strike the cause from the docket, for reason that the same had in effect been discontinued. And at October term, 1843, the motion to strike the cause from the docket was overruled, to which the defendant excepted. And by the parties it was agreed that the cause should go to the Supreme Court for decision at the January term, 1844.

WHICHER, for plaintiff in error.

HASTINGS, for defendant in error.

*PER CURIAM, MASON, CHIEF JUSTICE.— A motion *382 in this case for a discontinuance was overruled by the District Court. Without proceeding farther in that Court the parties consent to bring the question relative to the discontinuance into this Court. We shall decline acting in the matter. It is not our province to give advice to the District Courts, and our legitimate business furnishes us sufficient employment. The decision of the District Court now objected to, leaves this case still pending there. While it is so pending we will not entertain it here, even by consent of parties. The case will therefore be dismissed.

(*s*) A somewhat different rule has been prescribed by the Revision of 1860; see § 2632; see also Newell *v.* Sanford, 10 Iowa, 396; Caffery *v.* Groome, *ib.* 548; Berry *v.* Gravel, 11 Iowa, 135; Rev. §§ 2633, 2631; Callahan & Ingham *v.* Shaw *et al.* 19 Iowa, 183; In matter of Pierson's executors, 13 Iowa, 449; McCoy *v.* Julien (*Wright J.* dissenting), 15 Iowa, 371; Philips *v.* Shelton, 6 Iowa, 545; Jorden *v.* Henderson, 19 Iowa, 565; Rev. § 3214.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF IOWA.

JANUARY TERM 1845.

HON. CHARLES MASON, CHIEF JUSTICE.
" JOSEPH WILLIAMS, } ASSOCIATE JUDGES.
" THOMAS S. WILSON, }

JOSEPH HUGHELL, plaintiff in error, *v.* ALEXANDER A. WILSON, defendant in error.

Error to Jefferson.

The act of assembly of January 25th, 1839, authorizing a person who has a claim on the public lands marked out, but not enclosed, to maintain trespass against any person for cutting timber off the land so marked out, is valid (*t*).

This was an action of trespass brought by Wilson, against Hughell, before a justice of the peace, and a judgment obtained for twenty-nine dollars and fifty cents, for costs and damages against Hughell, for cutting timber off the plaintiff's claim.

(*t*) See Hill *v.* Smith, *ante*, page 70; Freeman *v.* Holliday, *ante*, p. 80; Zickafoose *v.* Hulich, *ante*, 175; Wilson *v.* Webster, *ante*, 312; Starr & Burgess *v.* Wilson, *post*, 438.

Joseph Hughell *v.* Alexander A. Wilson.

An appeal was taken to the District Court of Jefferson, and a verdict and judgment rendered for the plaintiff, for two dollars damages, and seventy-nine dollars and seven cents costs.

On the trial, defendant moved the Court to charge *384 the jury that the *act of the legislature entitled, "An act to prevent trespass and other injuries being done to the possession of settlers on the public domain, and to define the extent of the right of possession on the said lands," approved January 25, 1839, is invalid and void, there being no power in the legislature to enact the same.

Second, that no action will lie in any Court of law in this territory, brought by one private individual against another, to recover damages for cutting trees on the public lands, belonging to the United States, unless such cutting be done within an actual enclosure in the possession of the plaintiff. Which instructions the Court refused to give. To which refusal the defendant excepted.

The defendant below is plaintiff in error.

HALL & HUMPHREYS, for plaintiff in error.

TEAS, for defendant in error.

PER CURIAM, MASON, CHIEF JUSTICE.—The only question to be decided in this case is, whether the act of January 25, 1839, is valid so far as to authorize one person who has a claim on the public lands marked out and designated in accordance with that act, but not enclosed with a fence, to maintain an action of trespass against other persons for cutting timber thereon. We think the legislature in passing that act have not transcended their legitimate powers.

Before the enactment of that statute any person who had enclosed a portion of the public lands with a fence might maintain this action for trespasses within such enclosure. The legislature have declared that the marking out of the

grounds, in the manner provided for in the act, should be equivalent to an actual inclosure. They have merely changed the definition of the term, constructive possession, or rather, they have merely modified the circumstances under which this section would lie between one citizen and another. To deny them this power would be to restrict their authority to narrow limits; indeed, much narrower than we are prepared to sanction.

It is said that this law interferes with the primary disposal of the soil. Whenever the case arises in which it has such an effect it will be time to resort to this argument. We cannot perceive that it has had this effect in the present instance. Even supposing an action brought against a person for riding over the public lands in search of a desirable location of a farm which he was designing to purchase from the United States, is the argument any stronger against this law than against the *well established *385 and unquestionable rule, that an enclosure gives the right to maintain trespass? If a person in search of lands to enter, passes within an enclosure on the public domain, is he liable as a trespasser? No, for there can be no law made either by legislative enactment or judicial construction which shall interfere with the primary disposal of the soil. The same rule, and for a like reason, would apply to the case of a person for riding across public land marked out in pursuance of the statute we have been considering.

Counsel sometimes overlook the fact that a statute may be valid as to some purposes and illegal as to others. Whenever the act of 1839 is attempted to be used for interfering with the primary disposal of the soil, it is impotent, in other cases omnipotent. The case now under consideration is of the latter class.

Judgment affirmed.

JOSEPH REMSEY, plaintiff in error, *v.* JOHN DUKE, defendant in errror.

Error to Des Moines.

It is not improper to permit a witness to refer to a written instrument to refresh his memory, and to ascertain by its inspection if it relates to the contract then in controversy.

It is not erroneous to instruct the jury, "that if they were satisfied that there was an oustanding agreement for the payment of the purchase money for a claim," the plaintiff could not recover under the *indebitatus* count (*u*).

A promissory note does not prevent a recovery upon the count for an account stated.

The note is all the evidence that is necessary to sustain such a count.

This was an action of assumpsit brought by John Duke against Joseph Remsey, upon a promissory note for $150, of which the following is a copy: —

"We, or either of us, promise to pay John Duke, or order, one hundred and fifty dollars, on or before the public sale of the land on which said John Duke resides, at the time of land sale.

"JOSEPH REMSEY,
"GEORGE W. REMSEY,
"JESSE D. REMSEY.

"February 4th, 1839."

*386 *The first count in the declaration sets out the note in the usual form; the second, that the defendants, for a valuable consideration made a certain contract and agreement in writing signed by the said defendants with their own proper signatures, &c., by which contract and agreement in writing, the said defendants jointly and severally undertook and promised to pay the said plaintiff $150, on

(*u*) See King *v.* Hill, *ante*, 187, and note; and Gardner *v.* Abel, *post*, 489.

or before the public sales, &c., with an averment of the sales, &c.

The third count was for so much money for a certain improvement of the said plaintiff on the public lands of the United States, sold and delivered; and the fourth count was for so much money found to be due from defendants to plaintiff on account.

The sheriff had returned "not found," as to George and Jesse Remsey.

The defendant demurred generally to the first count, and specially to the second.

1. That it did not appear from said second count at what time the said sum of money fell due.

2. That it did not appear that anything was then due.

3. It did not appear that said agreement mentioned in the said count was made upon any consideration whatever, sufficient in law to make the same valid and effectual.

4. That said count did not state what land was intended, the sale of which was referred to, &c. The demurrers were sustained and the plaintiff entered a *nolle prosequi* to the first and second counts.

The defendant then pleaded the general issue, with notice of accord and satisfaction, and an agreement of plaintiff to deduct fifty dollars in consequence of failure of a consideration.

The case was tried at October term, 1841, and a verdict for $150 damages against the defendant. A motion was made for a new trial, which was overruled and a judgment rendered upon the verdict.

On the trial the plaintiff proceeded to offer evidence to prove the sale of the claim set out in the third count in the declaration, and offered a witness from whose evidence it appeared that a written agreement or note, not under seal, was executed to said plaintiff by said defendants, in payment of the consideration money for such claim, and who stated that he could not recite the conditions or terms

of sale without reference to said agreement, whereupon the said agreement was handed to him, to which the defendant objected, but the objection was overruled. Whereupon the witness stated that it was an agreement or note
*387 drawn for the *payment of the consideration money for said claim, mentioned in the third count.

The evidence being concluded, the defendant's counsel asked the Court to instruct the jury that if they were satisfied that there was an outstanding agreement in writing for the payment of the purchase money for said claim, he could not recover on the third count, even though said agreement be delivered up at the time of trial, to be cancelled as in this case. Which instruction was refused. To all which the defendant excepted.

The defendant below brings the case here by writ of error.

Errors assigned: —

1. That the Court below permitted the witness named in the bill of exceptions to refresh his memory under the circumstances set forth.

2. That the Court below refused the instructions asked for.

GRIMES & STARR, for plaintiff in error.

RORER, for defendant in error.

PER CURIAM, MASON, CHIEF JUSTICE. — The first question to be decided is, whether the Court below erred in permitting the witness to refer to the written instrument, under the circumstances set forth in the bill of exceptions. We think not. The plaintiff was seeking to establish an indebtedness for the sale of an improvement on the public lands. The terms of that agreement, so far as the payment was concerned, was set forth in this instrument, and it was not only permissible for the witness to refer to it, but that was the only

regular way of proceeding as soon as it should have appeared that this paper was thus connected with the transaction. It is true that it would seem from the bill of exceptions that the main object in permitting the witness to refer to the paper was to enable him to state the terms of the contract, when in fact the real purpose should have been to identify the note with the transaction of the sale. Still we think a mistake of this kind is no ground of error. It was proper that the witness should examine the paper in order to testify what he afterwards did in relation thereto; and the proceedings below in this respect were, therefore, substantially correct.

But another objection is taken on account of the fact that the Court refused to instruct the jury "that if they were satisfied that there was an outstanding agreement in writing for the payment of the purchase money for said claim, he cannot recover under the third count, even though said agreement be delivered up at the time of trial to be cancelled, as *in this case." We think this refusal *388 correct. It is everywhere held that a promissory note not only does not prevent a recovery on the count for an account stated when the same money for securing which the note had been given is sought to be collected by declaring in that manner, but that such note is all the evidence that would be necessary to sustain such a count. For aught that appears the "outstanding agreement" supposed in the bill of exceptions may have been a promissory note, But even if we can regularly regard it as applying to the instrument set forth in the bill of particulars in this case, there is still no error made to appear. If the lands on which the plaintiff below resided at the time of the land sales had been sold prior to the commencement of this suit, we think the instrument was evidence under the declaration. At all events it would not stand in the way of a recovery. As the plaintiff in error must make out an affirmative case before he can claim a reversal, he should

have set forth all the circumstances necessary to constitute error. If the lands aforesaid had not been sold, the evidence of such fact must be made to appear before we can reverse the judgment of the District Court.

Judgment affirmed.

GEORGE KEY *v.* JAMES W. ISETT *et al.*

Appeal from Des Moines.

If A and B promise to enter land for C, and A enters the land in his own name, although B should have advanced half of the purchase money to A, if A tenders to B his money and executes his trust by conveying to C, then B cannot have a decree against A for half of the land.

This was a bill in chancery, filed by George Key, against James W. Isett and Alexander Marshall, praying that they should be compelled to convey to him the undivided half of eighty acres of land, or account therefor, which he, the said Key, charged to have been purchased with the joint funds of himself and said Isett, and sold by Isett to Marshall, with notice of the complainant's interest, &c.

The prayer of the petitioner was denied, and a decree entered for the dismissal of the bill; from which decree the complainant appealed to this Court.

*389 *All the essential facts of the case are contained in the opinion of the Court affirming the judgment below.

ROREB & LEARNED, for complainant.

WHICHER, GRIMES & STARR, for defendants.

PER CURIAM, MASON, CHIEF JUSTICE.— The bill charges that Isett, in November, 1838, agreed with the complainant to

purchase with him jointly the west half of the south-east quarter of section eleven, township seventy-three, north of range four west, at the public sale of lands then soon to take place; that the complainant, who was obliged to be absent, was to deposit with Isett one-half of the minimum price thereof; that the latter was to attend the sale and purchase the land in their joint names, and for their equal and joint use and benefit; and should it cost more than $1.25 per acre, that Isett was to advance the necessary means, to be afterwards reimbursed by the complainant.

That the complainant did deposit the money in pursuance of said agreement, but that the defendant fraudulently purchased the land in his own name, with the joint funds of the contracting parties, and that he now refuses to convey the one-half thereof to the complainant, although he has proffered to re-pay him one-half the excess above the minimum price which was paid for the land. It then alleges a fraudulent combination with Marshall, the other defendant, and a sale to him, with a full knowledge of complainant's rights.

The answer of Isett admits the receipt of the money, but alleges that it was with an agreement and understanding with complainant that the land should be entered for the use and benefit of one Stevens, who then held the land as part of his "claim;" that Stevens, objecting to having Key concerned in the transaction, he, Isett, made the purchase in his own name with the purpose of faithfully performing his trust in favor of said Stevens; that as soon as he saw the complainant he advised him of what had been done, and offered to convey one-half the said land to him if he would obligate himself to convey to Stevens, upon his refunding the purchase money, with reasonable interest and compensation for trouble; to which Key objected, and he, Isett, thereupon tendered back $50 in gold, which he, Key, refused to receive.

Many of the most material averments in the answer are

not responsive to the bill, but allege new matter in avoidance. These require to be supported by proof. It, however, inferentially denies the allegation in the bill that the land was to be entered for the use and benefit of
*390 Key & *Isett, by averring that the agreement was that it should be entered for the use and benefit of Stevens. This is also sufficiently shown by the proof. R. W. Girvin, testified in answer to an interrogation from Key, calling for the statements of Isett, that the latter stated the land was to have been entered for the benefit of Stevens, and that he, Key, so understood it.

From the whole current of the testimony, this appears to have been one of those cases so common in this country, where the occupier of land, being unable to pay for it himself, was desirous of having it purchased by others who would take the title in their own name, to be transferred upon the re-payment of the principal and such interest as the parties should have agreed upon; that Key & Isett were to have entered the said tract in this manner, perhaps with the expectation that Stevens would never be able to repay them.

If such was the understanding of the litigant parties, and such the agreement with Stevens, there certainly was no resulting trust to Key, as that would be the trust of a trust. Had the title become perfected in Isett, Key would then have been entitled to his share, but the land being redeemed by Stevens, Key is in just as good a situation as though the purchase had been made in the joint names of Key & Isett, for they would then have been in conscience bound to have made the same conveyance as was made by Isett. And all the benefit that Key would have derived from the transaction, would have been a reasonable compensation for his trouble and interest upon his money, if any such was to have been paid by Stevens. But as he had none of the trouble, and as no interest was proved to have been paid, all that he seems to have been

entitled to from Isett was the $50, which had been deposited. As this was proved to have been tendered him by Isett, costs were properly awarded against him.

The decree of the Court below will, therefore, be affirmed.

WILLIAM PHILLIPS, plaintiff in error, *v.* JOHN RUNNELS, defendant in error. *391

Error to Jackson.

If a note which is not negotiable when executed is afterwards made so by statute, the assignee can then bring suit against the maker in his own name (*v*).

The making of such notes negotiable, and allowing the assignee to sue in his own name instead of suing in the name of the payee, for his use, is only a change of remedy, and does not affect the substantial rights of the maker.

A note is assignable after it falls due, but the purchaser buys it at his peril, as it is subject to the equities of the maker (*w*).

The action of debt lies by the assignee of a promissory note against the maker.

The assignee may sue in his own right, and may maintain the same kind of action as the payee might have maintained.

Where there is a variance in the declaration as to the amount due, it is only available on special demurrer.

(*v*) The rule now established by the decisions in Iowa is, that the party holding the legal title to a note may sue on it in his own name, though he be a mere agent or trustee, and liable to account to another for the proceeds, but in such case he is open to any *defense* which exists against the party beneficially interested; and the party beneficially interested, *though he may not have the legal title*, may sue in his own name. Farwell *v.* Tyler, 5 Iowa, 535; Fear *v.* Jones, 6 Iowa, 169; Sheldon *v.* Middleton, 10 Iowa, 47; Cottle *v.* Cole, 20 Iowa, 485; Rice *v.* Savery, 22 Iowa, 470.

(*w*) Upon the question What is assignable, see Weire *v.* The City of Davenport *et al.* 11 Iowa, 49; Charles *v.* Haskins *et al. ib.* 329; Edwards *v.* Montgomery & Shaw, 1 Iowa, 143; Rev. § 2760.

William Phillips *v.* John Runnels.

When depositions are improperly taken, if they are ruled out in the Court below, they cannot be assigned for error.

It is not necessary that a jury should have all the papers in the cause; the note on which the action is brought is all that is requisite.

If a verdict does not exceed the principal and interest of the note sued upon, it is good, although it may be for more than the damages laid in the declaration (*x*).

This was an action of debt brought by John Runnels against William Phillips upon a note of which the following is a copy:—

"Twelve months after date, I promise to pay unto George B. Phillips one hundred and ten dollars, for value received of him. Witness my hand and seal, this 26th day of October, 1835.

"WILLIAM PHILLPS [SEAL]."

Endorsed: "I hereby sign my right, title, and claim of the within note to John Runnells, this 6th day of July, 1841.

"G. B. PHILLIPS."

The plaintiff had a verdict and judgment at October term, 1842, for $144.47.

The facts of the case may be sufficiently ascertained from the bill of exceptions, the assignment of errors, and the opinion of the Court.

*392 * "Be it remembered, that on the trial of the above cause, at the present term of this Court, the defendant, by attorney, objected to the introduction of a certain promissory note or agreement, offered by the plaintiff in support of his declaration, because said note was expressed to be for the payment of one hundred and ten dollars, and that the declaration alleged that the note on which the action was brought was for the payment of one hundred and

(*x*) See *contra* Stradler, Bro. & Co. *v.* Parmlee & Watts, 10 Iowa 23.

forty-six dollars, which was a variance material to the action; and, also, that said declaration was uncertain in this: That there was a variance therein material to the case, it being alleged in said declaration that said note was given for the payment of one hundred and forty-six dollars, and also for one hundred and ten dollars. Which objections were overruled by the Court.

"And afterwards, the defendant, by his attorney, moved that the verdict of the jury in this case may be set aside, and a new trial granted for the following reasons: —

"1. That the jury in this case, when they retired to consider of their verdict, had not with them any of the papers belonging to the case, except the note, which was by some person unwarrantably and improperly severed from the depositions annexed to it.

"2. Because the verdict returned by the jury in this case is for the sum of one hundred and forty-four dollars and twenty-seven cents, whereas, the plaintiff, in declaration aforesaid, lays his damages in the sum of fifty dollars only, and the said verdict is for a sum greater than the damages demanded by the plaintiff.

"3. The verdict is against law and evidence.

"Which motion was overruled by the Court.

"The defendant, also, on the trial, objected to the admission of the depositions of John M. Whitaker and Martin Cox, for the reason, among others, that the defendant had no notice of the taking of said depositions.

"Which objection was overruled because it was proven by the testimony of W. A. Warren, as also by his official return, that the defendant had due notice.

"And the defendant, afterwards, by his attorney, moved the Court that judgment may be arrested in the above case, for the reason that the said promissory note in the plaintiff's declaration mentioned, and on which the action is founded, is not a negotiable promissory note, and was not assignable to the plaintiff, so as to enable him to bring

his action thereon in his own name. And that said Runnels, the plaintiff in said action, could not have or maintain the said action in his own name. Which motion was overruled by the Court.

*393 * "To which said several opinions of the Court in the matters aforesaid, and to the ruling of the Court therein, the defendant here in this, his bill of exceptions, objects and takes exceptions, &c.

"Note. The depositions of John M. Whitaker and Martin Cox, which were read in evidence in this case, were taken under a *dedimus protestatum*, issued by a justice of the peace in Van Buren county, Iowa, who brought before him as a witness, to testify under the commission aforesaid, one George B. Phillips, a person not named in the commission or notice to the defendant, and whose deposition said justice took and returned with the depositions of Whitaker and Cox. The note upon which the suit was brought was attached to the commission. Objection being made to the reading of the deposition of said George B. Phillips, the same was sustained, and the reading of the said deposition of the said George B. Phillips was prohibited by the Court.

"When the jurors were about to retire to consider of their verdict, the attorney for the plaintiff was about to hand to them the depositions of said Whitaker, Cox, and Phillips, to the jury, which the Court prohibited, but the judge of the Court separated the note from the depositions and handed said note to the jury, for the reason that it would be improper to admit the deposition of said Phillips to be handed to the jury, and it was necessary that the jury should have the note, in order to make up the verdict.

"The above proceedings were had on the 20th of October, 1842, with the exception of the overruling of the motion in arrest of judgment.

"Given under my hand this 21st day of October, 1842.

"T. S. WILSON [L. S.],

"*Judge 3d Ju. Dist. I. T.*"

The defendant below is plaintiff in error.

Errors assigned: —

General — Because the Court in the above cause rendered judgment against the said Phillips, the defendant, when in fact judgment should have been rendered against the said Runnels, the plaintiff, and not against the said Phillips, the defendant.

Special — 1. The promissory note or obligation in writing on which said suit was founded was not a *negotiable* promissory note, and could not be assigned so as to enable the assignee to bring an action in his own name against the promissor.

2. The said note could not be assigned so as to enable the assignee to bring an action of debt against the promissor.

*3. There was a material and repugnant variance *394 in the declaration in the statement of the debt due and owing, and also in the statement of the note declared on, in averring it to be for the payment of one hundred and forty-six dollars, and also for one hundred and ten dollars.

4. The depositions of John M. Whitaker and Martin Cox were improperly admitted by the Court, the said Phillips not having received legal notice of the taking thereof, and the witnesses were not sworn to the truth of said depositions.

5. The commissioner before whom said depositions were given exceeded his authority in taking the testimony of George B. Phillips, whose testimony he was not commissioned to take, and in putting interrogatories not contained in said commission, or annexed thereto.

6. The jury had not the papers with them when they retired to consider of their verdict.

7. The verdict is for a sum greater than the damages laid, or the amount of said note, and does not specify whether the whole or what part of the sum given by said verdict is for debt, and what part for damages.

WILLIAM J. A. BRADFORD, for plaintiff in error.

CRAWFORD & WRIGHT, for defendant in error.

PER CURIAM, MASON, CHIEF JUSTICE.—The first point made by the plaintiff in error is that the note on which this suit was brought was not assignable, so as to vest the legal right of action in the present plaintiff. The note, although not negotiable on its face, is rendered so by our statute, see laws of 1839, page 381. It is, however, contended that this statute would be inapplicable to a note executed like the one in the present instance before the enactment of the statute.

The argument is certainly a sound one, so far as all the substantial interests of the maker of the note are concerned, but it does not apply to the present case. The statute of 1839 does not affect any substantial right of the plaintiff in error. Before the enactment of that statute a note of the kind of that on which this suit was brought would have been assignable and vest in the assignee all the right he now possesses except that of bringing suit in his own name. Instead of reading, George B. Phillips, for the use of John Runnels, *v.* William Phillips, the title of the suit is now permitted to read: John Runnels *v.* William Phillips. This is all the effect the act of 1839 has had upon this case. Surely this is not such an infringe-
*395 ment of the rights of the maker of the *note as to exceed the power of legislation. It is merely a modification of the remedy.

The decision in the case of Griffey *v.* Payne, decided at the July term, 1840, does not contradict the positions above taken, for in that case the Court only held that a defence, valid at the time of the making of the note, could not be cut off by a subsequent statute. This is a very different thing from authorizing a mere change in the title of the suit, leaving all the parties' rights unchanged.

The position that a note is not assignable after it falls due, is wholly untenable. The purchaser buys at his peril, it is true. The note in his hands will be subject to the equities of the maker, but in other respects an assignment after due is of the same force and effect as though made before the note fell due.

It is further objected that the action of debt does not lie by the assignee of a promissory note against the maker. This was formerly the law, but the case is now different, and every assignee may now not only sue in his own right, but may also maintain *the same kind of action* as the payee himself might have maintained. See R. Laws of 1843, page 452. This provision merely affecting the remedy, is applicable to antecedent contracts.

The variance relied upon in the third assignment of errors is at most only available upon special demurrer.

The record shows the facts stated in the fourth assignment of errors to be untrue.

The fifth error assigned was cured by the act of the Court below in ruling out the deposition of the witness whose testimony was improperly taken.

It was not necessary that the jury should have had the "papers" with them. They had the promissory note in their possession, and this was all that was necessary.

The seventh and last error assigned relates to the form and substance of the verdict. It is certainly not a formal verdict, but we think it sufficient in substance. That in an action of debt it exceeds the mere damages laid in the declaration is no sound objection. It does not exceed the principal and interest of the note sued on, and there is no mistaking the meaning and intention of the jury.

Judgment affirmed.

*396 *THOMAS WYATT, plaintiff in error, *v.* JOHN BAILEY, defendant in error.

Error to Des Moines.

Where a payment is to be made in something besides money, the institution of a suit (which is a legal demand for *money only*) is premature, unless preceded by a demand for the payment provided for by the contract. And until such demand be first shown, the defendant is not bound to prove anything in defense (*y*).

This was an action of assumpsit brought by Thomas Wyatt against John Bailey. The amount claimed in the bill of particulars was $131.48, and the declaration contained a count for work and labor, one for goods sold and delivered, one for money lent and advanced, one for money had and received, and one on account stated.

Plea, general issue.

The cause was tried at February term, 1844, and a verdict and judgment rendered for the defendant.

The plaintiff removed the cause upon a writ of error.

GRIMES & STARR, for plaintiff in error.

RORER, for defendant in error.

PER CURIAM, MASON, CHIEF JUSTICE.—All the errors assigned in this case are founded upon the bill of exceptions, which reads as follows:

"Be it remembered, that on the trial of this cause, the plaintiff offered as a witness, Joseph Morgan, who was duly sworn, and testified that in June, 1840, he had in his pos-

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(*y*) See Rev. of 1860, §§ 1806, 1807, 1808, 1809, 1810, 1811; Hambel *v.* Tower, 14 Iowa, 530; Wiley *v.* Shoemack, 2 Gr. 205; Games *v.* Manning, *ib.* 251; Williams *v.* Triplett, 3 Iowa, 518; Phillips *v.* Cooley, 2 Gr. 456; Frederick *v.* Remking, 4 Gr. 56; Barker *v.* Brink, *ib.* 59; Crabtree *v.* Mersersmith, 19 Iowa, 179.

session a yoke of cattle belonging to the plaintiff in this suit; that the defendant came for the same and told witness that he had bought them from plaintiff, and was to pay $60.00 to $70.00. The witness then asked how they were to be paid for, when defendant replied that they were to be paid for in their land deal. No other evidence was given by plaintiff as to sale of oxen mentioned in the bill of particulars attached to the declaration. Plaintiff's counsel asked the Court to charge the jury that it devolved upon defendant to prove that the oxen had been paid for, after the proof aforesaid by plaintiff of a sale to defendant, but the Court refused to charge the same, and charged that if the jury believed from the evidence that there was *a special contract between the parties, that the oxen *397 were to be paid for in something besides money, it devolved upon the plaintiff to show a demand of such payment before suit could be brought for the recovery of money, and that if the oxen were to be paid for in land deal, it was not incumbent upon the defendant to prove in the first instance that payment had been made in pursuance of the agreement, nor to show and explain what the precise agreement was; but if there was a special agreement couched in ambiguous terms as to the mode of payment, it devolved upon the plaintiff to explain the contract and then show the demand for performance on the defendant, and a refusal or neglect on his part, before suit could be brought thereon."

Was there error in these instructions? we think not. The same witness who testified to the admissions of the purchase of the oxen, had stated as a part of the same conversation that they were to be paid for in "land deal." Had a simple sale of the oxen been shown, the law would have presumed that the payment was to have been in money. In such a case the bringing of the action would have been a sufficient demand, and it would have been incumbent on the defense to have proved payment.

But where the payment is to be made in something besides money, the institution of a suit, which as a legal demand for *money only*, is premature, unless preceded by a demand for the payment provided for by the contract. Unless such demand be first shown, the defendant is not bound to prove anything in defense.

Nor was it necessary for the defendant to have shown what the precise nature of the transaction was. The plaintiff had shown a sale for which payment was to be made in something besides cash. The presumption of law that money was to have been paid did not arise. The case would have presented a somewhat different aspect if the plaintiff had shown a mere sale, and the defendant in defense had set up that payment was to be made in "land deal." In that case there would have been much greater reason for requiring the defendant to have proved and explained what the precise nature of the transaction was.

Objection was made in the argument, that the Court below exceeded its duty by intimating that there was a special agreement. The evidence certainly showed sufficient to justify the Court in putting the hypothetical case set forth in the bill of exceptions. There is nothing to show that the Court instructed the jury that there was a special agreement, or that the words "land deal" conveyed the idea of a special contract as set forth in the assignment of errors.

Judgment affirmed.

*TIMOTHY FANNING, plaintiff in error, *v.* THOMAS *398 M'CRANEY, defendant in error.

Error to Dubuque.

As a general rule, questions in regard to new trials are submitted to the sound discretion of the District Court, and a case of manifest error must be made out to induce the interference of the Supreme Court (*z*).

It is a general rule, that where newly discovered evidence is expected to be proved by a witness who was called and examined, no new trial will be granted, it being the duty of the counsel to ascertain the extent of the witness's knowledge when he is on the stand (*a*).

The excepting party must make out an affirmative case of error, and such as works substantial injustice (*b*).

This was an action of assumpsit brought by Thomas M'Craney, against Timothy Fanning. At November term, 1842, a verdict and judgment was rendered for the plaintiff for three hundred and twenty-eight dollars and seven cents.

After the trial, the defendant asked for a new trial upon the ground of newly discovered evidence. The affidavit itself shows a *prima facie* ground for the grant, but the witness by whom the defendant could establish the new evidence, had been called upon the trial, as a witness for the *plaintiff*, and the defendant had objected to his being sworn, on the ground that he was interested in the suit.

(*z*) The rule established in this state is, that motions for new trials, for the reason that the verdict is against the evidence, are peculiarly addressed to the sound discretion of the Court trying the cause, yet it is a legal discretion, and must be legally and properly exercised. Jordan *v.* Reed, 1 Iowa, 135; Stewart *v.* Ewbank, 3 Iowa, 161; The State *v.* Tomlinson, 11 Iowa, 401; Lodge *v.* Reznor, 13 Iowa, 600; McKay, *v.* Thorington, 15 Iowa, 25; Denton *v.* Lewis, *ib.* 301.

(*a*) Lisher *v.* Pratt, 9 Iowa, 59; Richards *v.* Nichols, 19 Iowa, 555.

(*b*) Rev. §§ 3111, 2978; Coldren & Co. *v.* Cole, 19 Iowa, 565; Smith *v.* Melburn, 17 Iowa, 30; Doniphan & Hughes *v.* Street, *ib.* 317.

The affidavit of Fanning stated that after the trial he had discovered new evidence highly important and material to his defense, as he verily believed, and as informed by counsel, and that he had no means of knowing before the trial that he could prove the facts which he had discovered after the trial, that he could prove by Frances Gehon, that said newly discovered evidence came out on the trial on an indictment against the affiant, where said Gehon was a witness for the prosecution; that he was unable to procure the affidavit of said Gehon, to be used on a motion for a new trial, because said Gehon and himself were unfriendly, and that said Gehon was one of his most bitter enemies, and had done all he could to defeat him in this action, and was instrumental in getting up an indictment for perjury against him, which grew out of the subject matter of this suit. Affiant further stated that the testimony he had discovered, and which he believed to be material, would go to establish a fact or point in his defense upon which *399 no evidence was given on the *trial, and which was of a different kind and character from that adduced on the trial, viz: that the action was for the use and occupation of Jordan's ferry, on the Illinois side of the Mississippi river. That the evidence offered on the trial to hold him liable for seven hundred dollars for the use and occupation of the ferry and appurtenances was of a circumstantial and inferential character, and was not positive. That the evidence of Gehon, which he had discovered after the trial, was in substance that he, Fanning, agreed to pay the debt of a third person, viz: that he should pay the debt of Thomas M'Craney to George W. Jones, or should save M'Craney harmless from the claim of Jones, for the use of the ferry, which M'Craney had taken from Jones on a lease, and that no promise was made on the part of Fanning to pay anything directly to M'Craney for the ferry. In a word, he could prove by Gehon that he, Fanning, had made a special contract by which he promised to pay the

debt or answer for the default or miscarriage of a third person, and that this contract was contrary to the statute of frauds, upon which M'Craney sought to recover, &c., &c.

Upon this state of facts, the Court below refused a new trial, and the defendant, Fanning, brought the case up to this Court upon a writ of error.

Berry & Rogers, for plaintiff in error.

Davis & Crawford, for defendant in error.

Per Curiam, Mason, Chief Justice.—The only error assigned in this case is that the Court below refused to grant a new trial upon the affidavit filed in the case. As a general rule, questions in regard to new trials are submitted to the sound discretion of the District Court, and a case of manifest error must be made out to induce the interference of this Court. This rule is just and proper, for many of the circumstances which operate upon the Court below to cause the granting or denying of a new trial, are incapable of being presented to us.

The basis of the motion for a new trial, as set forth in the affidavit, is that new evidence has been discovered. But the bill of exceptions shows that the witness by whom the new facts were expected to be proved was called as a witness below, and on motion of Fanning's counsel was rejected as interested. It is a general rule that where the newly discovered evidence is expected to be proved by a witness who was called and examined, no new trial will be granted, it being the duty of the counsel to ascertain the extent of the knowledge of the witness *when *400 he is on the stand. There appears to be no great difference between that case and the present.

But the newly discovered evidence itself is not sufficient to justify this Court in granting a new trial. The object of the counsel for the plaintiff in error, was to show that

the case was within the statute of frauds. The expected testimony, if proved, would be very far from showing sufficient for this purpose.

In the first place, it would not negative the fact that such agreement or some note or memorandum thereof was in writing and signed by the party sought to be charged, or his lawfully authorized agent, and as it is the business of the excepting party to make out affirmatively a case of error, the defect just stated would seem decisive. But even if the promise had been verbal, the case would not have been within the statute. Had suit been brought by Jones, the defense would be valid. The statute contemplates such a case. But M'Craney sues on a verbal contract by which Fanning promised to pay to Jones a certain sum of money. If such promise was based upon a sufficient consideration, although not in writing, we think an action would lie by M'Craney for a breach thereof And although the plaintiff has not declared on such a contract, yet in order to obtain a new trial the party should show a reasonable probability that substantial injustice has been done; not merely that he can prove a technical objection to a recovery.

But although the statute of frauds would have protected the defendant below, for ought that appears, the use and occupation of the ferry was the very consideration of the promise by Fanning to pay M'Craney's debt to Jones. Could he retain the consideration and still refuse to perform the contract? The law does not sanction such injustice, much less become an accomplice in its perpetration. The action for use and occupation would in that case have been properly brought.

The judgment below will therefore be affirmed.

*Peter Moore, plaintiff in error, *v.* William G. *401 Ross, defendant in error.

Error to Des Moines.

The defendant, by pleading over, waives his objections to the overruling of the demurrer (*c*).

The Court may properly award full costs on a judgment for nominal damages in replevin.

The statute declaring that no more costs than damages shall be recovered, is complied with by including the value of the property replevied.

This was an action of replevin brought by Ross against Moore for the unjust detention of a lot of hops, two hundred and fifty pounds, of the value of $500. The defendant demurred to the plaintiff's declaration, specially, first, because there was a variance between the writ and the declaration, the writ being in the *detinet* and the declaration in the *detinuet*, and the return of the writ not showing *replegiari faci.* Second, the property sought to be replevied not being sufficiently described. Third, there being no sufficient venue. Fourth, that said declaration charged the defendant with detaining two hundred and fifty pounds of hops of plaintiff, worth $500.

Afterwards, to-wit: on the same day, on motion, the plaintiff had leave to amend his declaration by inserting "in two sacks," and on the same day the defendant's demurrer was overruled. Afterwards, on the same day, the defendant filed his avowry that the detention of the hops was as bailiff or carrier, &c., for the purpose of transporting said hops from St. Louis to Burlington, &c., &c. To which there was a replication.

(*c*) So held in the following cases: Ewbank *v.* Whittaker, 11 Iowa, 197; Smith *v.* Taylor, 11 Iowa, 214; County of Mahaska *v.* Ingalls, 14 Iowa, 170; The State *v.* Klingman, *ib.* 404; Franklin *v.* Twogood, 18 Iowa, 515; Wilcox *v.* McCune, 21 Iowa, 294.

Peter Moore *v.* William G. Ross.

The case was submitted to a jury on the 12th March, 1842. Verdict: —

"We, the jury, do find for the plaintiff, and assess the damages $000." Judgment that the plaintiff have and recover of the defendant the sum of fifteen dollars and six cents, the costs, &c.

The defendant brought the case here upon writ of error.

Errors assigned: —

1. In overruling the demurrer of the plaintiff in error, and because there was no sufficient description of property in the declaration.

2. In giving judgment for costs against the plaintiff in error, inasmuch as there was no verdict upon which to found said judgment.

*402 *3. In giving judgment for costs against the plaintiff in error, the action being in *tort*, inasmuch as the jury found no damages against plaintiff in error, &c.

Woods, for plaintiff in error.

Rorer, for defendant in error.

Per Curiam, Mason, Chief Justice. — We will first consider the subject of the demurrer filed in the Court below. We think that by pleading over the defendant waived his objections to the overruling of the demurrer. See 1 Scam.'s Reports, 222, 310, 281, and 471. This rule will not prevent a review and correction of such errors as are vital, and which can be reached by a writ of error, without the filing of *any* demurrer. But for formal defects, we think it will be better to compel the parties to stand to their demurrers, or waive their objections.

But the point which seems to be most confidently relied on by the plaintiff in error is, that the Court erred in rendering full costs, there having been less than fifty dollars damages found by the jury.

The rule contended for by the plaintiff in error would be unjust and unreasonable. The justice's act limited the jurisdiction of the magistrate to cases where the value of the *goods and chattels* wrongfully detained was not more than fifty dollars. The bare damages for wrongfully detaining property of the value of thousands of dollars would often be less than fifty dollars, so that if the construction contended for be the true one, the most outrageous wrongs and impositions might be perpetrated, and then all remedy denied to the injured party, except at his own costs.

But such is not the natural construction of the statute upon which the plaintiff in error relies. That statute declares: —

"That in all actions of *tort*, brought originally in any of the District Courts of this territory, if the plaintiff recovers less than fifty dollars, such plaintiff shall recover no more costs than damages." Acts of 1840–1, page 21.

The question of costs here is dependent, not upon the amount of *damages*, but upon the whole amount recovered. This, in the present case, was a large amount of hops, claimed by the plaintiff below to be worth $500.00. Had he not given bond and been put into possession of these hops, the suit might still have progressed, and the value of the hops might then have been part of the damages recovered. See acts of 1838–9, pages 399 and 400 §§ 11, 15, 21. In such cases he would *clearly have *403 been entitled to full costs, if the whole amount of the recovery exceeded fifty dollars. By giving bond and getting possession of his property at once, his right to costs is not placed in jeopardy.

It may be objected that in this case there is nothing to show that the full value of the property recovered exceeds fifty dollars; but the simple answer to this is, that he who seeks a reversal must himself make out and demonstrate some positive error in the proceedings below.

Judgment affirmed.

JOHN G. DESHLER, plaintiff in error, *v.* SUEL FOSTER defendant in error.

Error to Muscatine.

Where the transcript of the justice of the peace shows an appearance by attorney on a motion to quash the attachment, it will be regarded as an appearance in general, and the defendant will be estopped from a motion to dismiss the cause when taken to the District Court on an appeal, for the want of personal service.

This was a suit by an attachment brought by the defendant against the plaintiff in error before a justice of the peace. On the return, an attorney appeared for the defendant, and moved to quash the attachment for reasons filed, which was overruled. The defendant's attorney then moved that the plaintiff amend his affidavit so as to insert the circumstances upon which he predicated his belief that the defendant had absented as required by law, and on the plaintiff refusing to amend, the attorney abandoned the case.

A jury was called, who returned a verdict for the defendant, and judgment was rendered against the plaintiff for costs.

The plaintiff appealed to the District Court, where a motion was made to dismiss the appeal, because there was no service on the defendant personally, or by notice, which was overruled by the Court; to which the defendant excepted.

To reverse this judgment the defendant sued out a writ of error from this Court.

LOWE, for plaintiff in error.

*404 *WOODWARD, for defendant in error.

PER CURIAM, MASON, CHIEF JUSTICE. — The only error assigned in this case is, that the Court below erred in

overruling the motion made by the defendant to dismiss the suit, because there was no service made on the defendant below personally, or by notice. We think there was such an appearance below as to cure this defect. The transcript of the justice shows that the defendant appeared by his attorney. There is nothing to show that such appearance was for a special purpose; and, although the acts of that attorney were limited to matters connected with the process of attachment, and although he left the justice's Court when he had failed to accomplish certain purposes of a preliminary character, the record shows no sufficient reason to induce us to doubt that his apperance was in the first instance general.

Judgment affirmed.

JOHN CULBERTSON and JOHN FINCH, plaintiffs in error, *v.* JOHN J. TOMLINSON, defendant in error.

Error to Cedar.

Where a suit is brought upon a bond in which the penalty is beyond the amount of a justice's jurisdiction, the case is cognizable before him if the amount claimed does not exceed fifty dollars (*d*).

Where the action appears to be substantially brought upon a penal bond before a justice of the peace, although a bill of particulars for unliquidated damages may be filed, it will be regarded as regular, the proceedings before justices not being limited to strict technical rules.

This was an action of debt brought by Tomlinson against Culbertson & Finch, before a justice of the peace, on an attachment bond, with a penalty of one hundred dollars. The debt claimed was fifty dollars. The defendants moved

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(*d*) See Bush *v.* Etson & Etson, *ante*, 316, note (*v*).

for a non-suit on the ground that the bond was for an amount above the justice's jurisdiction, which was granted.

The plaintiff appealed to the District Court, and a verdict and judgment was had for the plaintiff for the sum of one dollar, at April term, 1843.

On the trial the defendants objected to the admission
*405 of the bond in *evidence, which was overruled, and the bond permitted to be read to the jury.

The defendants below sued out a writ of error from this Court.

Lowe & Cook, for plaintiffs in error.

Carleton, for defendant in error.

Per Curiam, Mason, Chief Justice.—One of the objections taken by the plaintiffs in error in this case is, that if the action is considered as being brought upon the bond the case was not within the jurisdiction of a justice of the peace. Such jurisdiction is limited to cases where the "debt or sum claimed" does not exceed fifty dollars. In this case the *sum claimed* was only fifty dollars, and although the penalty of the bond was for a larger amount, we think there was no excess of jurisdiction. See Hall *v.* Biever, decided at the July term, 1841.

But it is said that the action was not brought upon the bond, but for unliquidated damages, and therefore debt would not lie. We must not limit the proceedings before justices of the peace to strict technical rules. The action seems to have been substantially brought upon the bond, which is all that was necessary.

Judgment affirmed.

MARY ANN WILFORD, plaintiff in error, *v.* WILLIAM MILLER, defendant in error.

Error to Cedar.

A special deputy sheriff is a legal and proper officer to serve process.
The attorney of the plaintiff may be the special deputy to serve a summons.
A judgment may be entered against one, only, of two defendants in an action of right.

This was an action of right, brought by William Miller against Joseph Wilford and Mary Ann Wilford.

Upon the writ of summons there was the following return of service: "Served the within on Mary Ann Wilford, by reading, personally, the 4th of September, 1844. Joseph Wilford, Jr., not found. Patterson *Fleming, sheriff of Cedar county, by John P. Cook, *406 specially deputed to serve this writ."

At the September term, 1844, judgment was rendered against Mary Ann Wilford by default. Subsequently, at the same term, the said Mary Ann moved the Court to open up the default for the following reasons: First, the party defendant is not in Court, that is the party aforesaid is a unit, and Joseph Wilford, Jr., is not served, the plaintiff cannot call for a plea from Mary Ann Wilford, for that would compel the defendant to sever in pleading; secondly, it being admitted that John P. Cook, Esq., was specially deputed to serve said writ, that he was one of the attorneys in the cause, &c.; for this reason said Mary Ann prayed the service to be set aside, the default opened up, and the judgment set aside; which motion was overruled.

Mary Ann Wilford sued out a writ of error.

Errors assigned:—

1. The summons purports to be served by a person other than the proper officer; and the manner of service is not

for a non-suit on the ground that t' [illegible]panying the return amount above the justice's jurisdicti[illegible]efore, in this there is

The plaintiff appealed to the D[illegible]

dict and judgment was had for [illegible]e served by the plaintiff's one dollar, at April term, 184[illegible]

[illegible]ast one, when it should have

On the trial the defe[illegible]ner.

*405 of the bond in *ev[illegible]n Wilford was adjudged to be in the bond permitt[illegible]s error.

The defendants be[illegible]

Court. [illegible]aintiff in error.

Lowe & Coop[illegible] defendant in error.

Carleton[illegible] Mason, Chief Justice.— The first question this case is whether the summons was prop-

Per Cu[illegible] returned. The statute declares that where jections [illegible]other than the proper officer, serve such sum- if the [illegible] service must be duly shown to the Court, by the [illegible] accompanying the return of the writ, and filed the [illegible]herewith. Was the special deputy who served and re- "[illegible] served the summons in this case, "the proper officer," t' [illegible]which the statute contemplates? We think so. The 14th section of the act regulating the appointment and duties of sheriffs (Acts of 1843, page 580), after providing for the appointment of a deputy sheriff, contains the following proviso: "That nothing in this act contained shall

*407 be so construed as to prevent any *sheriff from appointing so many deputies as he may deem proper. And further, that no person deputed to do a particular act only, shall be required to take the oath or affirmation to be taken by the deputies of sheriffs."

Here is indirectly an authority for the appointment of special deputies. What are their duties and powers? A deputy stands in the place of the principal, and where a sheriff has authority to make such an appointment, the act of the deputy is of equal validity with the act of the sher-

...r of the sheriff to appoint
...e of this kind? We know of
...The power is general; we can-
...t. And the sheriff and his depu-
...ers for serving a summons in an

...is no valid objection to the attorney of
...ng made the special deputy to serve the

...ntiff in error further objects that the judgment
...st one of the defendants, when it should be against
... or neither. We do not think this a tenable position.
...e authorities cited in its support are not drawn from cases in ejectment (which are governed by similar rules to our actions of right). We believe it to be the general rule that in actions of ejectment the verdict and judgment may properly be against one only of two defendants.

We see no force to the objection against entering a default against Mary Ann Wilford, when the record shows that she was in default.

Judgment affirmed.

George W. Hight and George V. Hight, *v.* The United States.

Certiorari to Des Moines.

A prisoner under an indictment for murder cannot, as a matter of right, claim to be admitted to bail on *habeas corpus*.

An indictment furnishes no presumption of guilt against a prisoner when he is upon his trial, but so far as it regards all intermediate proceedings between the indictment and trial, it furnishes the very strongest possible presumption of guilt (*e*).

(*e*) See Platt *v.* Harrison, sheriff, 6 Iowa, 79; *ex parte* Grace, 12 Iowa, 208.

George W. Hight and George V. Hight *v.* The United States.

The provisions of our *habeas corpus* act, so far as they require the hearing of original testimony, contemplate cases where no indictment has been found.

The finding of the grand jury is conclusive so far as to control all proceedings up to the time of trial before the petit jury.

*408 *George W. Hight and George V. Hight, confined in jail on an indictment for the murder of Peter Andrews, petitioned the District Court of Des Moines at the November term, 1844, for the benefit of the writ of *habeas corpus*, which was granted. Upon the return, the prisononers by their counsel, moved the Court to admit them to bail, and for liberty to produce evidence to the Court to prove and satisfy the Court that the charges contained in the indictment were not based upon proof that was evident, or presumptions that were great. That the offense charged was based upon the lowest possible presumption. Which evidence the Court refused to hear; and ruled that the finding of the grand jury, in capital cases, was conclusive as far as that application was concerned, and that the petitioners were not bailable, and the Court could not enquire into the kind or character of the proof upon which the charges in the indictment were based.

To which decision and ruling of the Court the said petitioners excepted; and have brought the case up for review and determination.

HALL, MILLS, GRIMES & STARR, for the petitioners.

The grand jury hear evidence on the part of the prosecution. The object of a grand jury — Cowen's Phil. Ev. vol. 3, p. 288.

If there be any presumption against the prisoner from the fact that an indictment is found against him, then the prisoner should be required to prove his innocence; same, 289; 3 Dane's Ab. p. —, that there is a presumption of innocence.

10 Petersdorf's Reports, 520 — The first presumption

against the prisoner is the verdict of the jury. 5 Cowen, p. 52. The Court has a right to in all cases, as well as before as after the indictment.

STOCKTON, for the United States, in reply, relied upon the *habeas corpus* act of the territory.

As to the refusal to go behind the indictment, he cited 2 Am. Com. Law, 114. The power of the Court to admit to bail is discretionary. The Court has power to admit to bail where there has been a coroner's verdict. The authorities cited by plaintiffs in error are only cases where there were verdicts of coroners' juries.

Same authorities — citing a case in La.

Where the Court refused to go behind the indictment. See this case, particularly, for the Court in that case says, they knew of no case where the Court went behind the indictment; he admitted that before indictment found, or after a coroner's verdict, the judge may admit to bail, *but contended that the American and English *409 authorities showed that it could not be done after indictment. That the *habeas corpus* act did not alter the common law. That the 15th section of the act aforesaid refers to persons arrested previous to indictment, and also to the 22 section.

HALL, in rejoinder, referred particularly to 5 Cowen, p. 52. The only objection given in all the cases going behind the indictment, in all the cases cited is that the Court cannot become possessed of the testimony upon which the indictment was found, the testimony having been given in under the sanction of secrecy.

PER CURIAM, MASON, CHIEF JUSTICE.— After the plaintiffs in error had been indicted for murder they were brought before the District Court of Des Moines county by a writ of *habeas corpus* for the purpose, on their part, of being let to bail. It was contended for them that although

they had been indicted for murder, yet the evidence against them before the grand jury was of such an unconclusive character, that they were entitled to be discharged on bail as a matter of right, and it was claimed to be the duty of the Court to go into an original examination of the whole matter, and to decide according to the nature of the proof then furnished. The Court refused to bail the prisoners, or even to look behind the indictment. Whether that determination of the Court was legal or proper, is the question brought up for our consideration.

The ordinance of 1787, the benefits of which have been transmitted to us, declares that "all persons shall be bailable, unless for capital offences where the proof shall be evident, or the presumption great." It is contended that an indictment furnishes no such proof or presumption.

This is no new provision, but is in express terms incorporated into the constitutions of at least one-half of the states of the Union, and is the rule of action in all the rest. It is merely declaratory of the common law of the United States. If the construction contended for by counsel be correct it is a little remarkable that no case can be found where a similar application has been successfully made.

It is true, there have been cases where prisoners, after having been indicted for murder, have been admitted to bail, but not as a matter of right, nor upon the examination of original testimony. There is no doubt of the *power* of the Court to let to bail after indictment for a capital offence, but can the prisoner require the Court to disregard the indictment as furnishing no presumption of guilt, and can he lawfully claim to be let to bail as a matter of
*410 right, unless evident proof or great *presumption can be shown whenever he sees proper to have himself brought up on a writ of *habeas corpus*?

Authorities have been cited to the effect that an indictment furnishes no presumption of guilt. This proves too much, else why should not the prisoner be discharged al-

together? Can a person against whom there is no presumption of guilt be required to give bail for his appearance at Court? The truth is, that these authorities, although good law, have been misapplied. An indictment furnishes no presumption of guilt against a prisoner when he is upon his trial, but so far as it regards all intermediate proceedings between the indictment and trial, it furnishes the very strongest possible presumption of guilt, if a grand jury is the appropriate organ of the law to decide in the first instance upon the guilt or innocence of the accused, and their finding of a true bill is conclusive so far as to put him upon his trial and to control all the intermediate proceedings. It is then *functus officio*, and raises no further presumption.

The humanity of our law requires that before a person shall be punished as a criminal, he must be found guilty by two independent juries. The verdict of the first raises a full presumption of guilt up to the time of his trial before the second. The authorities, so far as any can be found applicable to the case, sustain the views we have now taken. See 3 Petersdorf, 307; 1 Bac. Abr. 493; 2 Am. Com. Law, 116.

But our *habeas corpus* act is relied upon as exercising a peculiar influence over this case. The 15th section of that act declares, that "The officer before whom the party shall be brought on such writ, shall immediately after the return thereof proceed to examine into the facts contained in such return, and into the cause of the confinement or restraint of such party; whether the same shall have been upon commitment for any criminal or supposed criminal matter or not." The 22d section further provides that "The party brought before any such officer, on the return of any writ of *habeas corpus* may deny any of the material facts set forth in the return, or allege any fact to show either that his imprisonment or detention is unlawful or that he is entitled to his discharge, which allegations or denials shall be on oath.

And thereupon such officer shall proceed in a summary way to hear such allegations and proof as may be produced in support of such imprisonment or detention, or against the same, and to dispose of such party as the justice of the case may require."

It is contended that these sections of the act change the ordinary course of procedure in cases like the pres-
*411 ent, that as the law does not *except cases where indictments have been found the duty of hearing "the allegations and proof" applies to such cases.

Admitting this to be true, the indictment itself furnishes all the requisite proof. Any other construction would lead to the most absurd consequences.

In the first place, the officer who issues the writ of *habeas corpus*, if he can look behind the indictment and go into original proof to ascertain whether the grand jury had sufficient grounds for their action, may discharge the prisoner altogether. A judge would thus become an appellate tribunal to reverse or affirm the decisions of grand juries, and may thwart the action of that body altogether, if he sees proper.

Again, if the finding of a grand jury does not supersede the necessity of a reinvestigation of the original evidence by the judge, much less would a previous examination of the case under a writ of *habeas corpus* issued by that same judge, or one of his associates, have this effect. What then is to prevent a prisoner from having a new examination every day of his confinement, until having wearied out the witnesses and the prosecutor, or for some other cause there becomes a failure of evident proof, or great presumption of guilt. When that failure takes place must not the prisoner be discharged, independent of all the knowledge which the officer has acquired by former examinations, for why require an examination of original testimony unless the officer is to be governed thereby?

But further than this, the sections of the law above quoted

do not except cases of persons convicted by petit juries. The convict in jail awaiting execution is, under our statute, entitled to his writ of *habeas corpus*, and when brought before the judge, if the proof then made should appear insufficient, it would not only be his right, but his duty to discharge the prisoner either absolutely or on bail according to the strength of the evidence. This would be raising up a new pardoning power wholly unknown to our laws and institutions, and at war with both.

But it will be replied that the verdict of the petit jury furnishes that great presumption of the prisoner's guilt, which the ordinance of 1787 comtemplates. So does the indictment by the grand jury (see anthorities above cited). But the declaration in the ordinance, is that "all persons shall be bailable unless for capital offences, &c." Is the convict in the penitentiary bailable? And yet the *habeas corpus* act makes no exceptions to his exclusion.

The evident answer to this last question is, that the object of the **habeas corpus* act is to prevent arbitra- *412 ry and illegal imprisonment; to guard the rights of the accused prior to conviction, but not to interfere with his punishment. We go one step further and say that the peculiar object of this writ is to guard the accused up to the time his case is passed upon by a grand jury; not for the purpose of controlling, reviewing, or thwarting the action of that body.

We therefore conclude that the provisions of our *habeas corpus* act, so far as they require the hearing of original testimony, contemplate cases where no indictment has been found. The finding of the grand jury is conclusive, so far as to control all proceedings up to the time of trial before the petit jury, the verdict of the latter is conclusive altogether.

The decision of the Court below is, therefore, affirmed.

The United States *v.* Thomas Dickey.

Certiorari to Jefferson.

An indictment will not lie at common law, nor under the act of Congress of 1825, against a person for the crime of perjury, for swearing or affirming falsely to the schedule attached to a petition for a certificate of bankruptcy, under the provisions of the bankrupt act of 1841.

The substance of the statutory definition of an offense, must be contained in an indictment, and that by no remote or doubtful inference (*f*).

The bankrupt law of 1841, as to the penalties for its violation, is complete within itself.

The petitioner, for a fraudulent concealment of his property, &c, and exhibiting a false schedule, is not liable to be indicted for perjury, unless he subsequently swear falsely to interrogatories specially propounded. The consequence of a false statement in the first instance, is the loss of a certificate of bankruptcy, and in the second, the petitioner incurs the penalties attached to the crime of perjury.

The case is explicitly set forth in the opinion of the Court.

W. G. Woodward, for the United States.

Shuffleton & Gray, for the defendant.

Per Curiam, Mason, Chief Justice. — The following indictment was found against the defendant in this case, by the grand jury of Jefferson county:—

*413 *"United States of America, Iowa territory, Jefferson County, September term of the District Court of the first Judicial District for said county, 1843.

(*f*) The State *v.* Leamons, 1 Gr. 418; The State *v.* Chambers, 2 Gr. 308; The State *v.* Douglass, 7 Iowa, 443; Buckley *v.* The State, 2 Gr. 162; Nash *v.* The State, *ib.* 286; Romp *v.* State, 3 Gr. 276; Winfield *v.* State, *ib.* 339; Reddan *v.* State, 4 Gr. 137; Munson *v.* State, *ib.* 483; State *v.* Hessenkamp, 17 Iowa, 25; State *v.* Baldy, *ib.* 39; State *v.* Middleton, 11 Iowa, 246; State *v.* Care, 7 Iowa, 479.

"The grand jurors for the United States, duly impannelled and sworn to enquire in and for the county of Jefferson at a District Court of the United States, began and held in said county at the Court house in Fairfield, on Monday the 11th day of September, 1843, on their oaths present, —

"That Thomas Dickey, at the county aforesaid, on or about the 9th day of May, 1842, filed his petition in bankruptcy, in and before said Court, sitting as a District Court of the United States, for the first judicial district, in and for said county of Jefferson, praying to be declared a bankrupt under the bankrupt act of the United States, approved August 19th, 1841, and dealt with accordingly; to which said petition a schedule was annexed as a part thereof, purporting to set forth to the best of his knowledge and belief of the said Dickey, as list of his creditors, their respective places of residence, and the amount due by the said Dickey to each of them, together with a (pretended) accurate inventory of the property, rights, and credits of the said Dickey of every name, kind, and description, and the location and situation of each and every parcel and portion thereof; his, the said Dickey's, wearing apparel, and that of his wife and children, excepted; which said petition and schedule being produced before John A. Pitzer, a commissioner in bankruptcy, duly appointed by said Court, and authorized to administer oaths, he, the said Dickey, did then and there falsely, wickedly, willfully, corruptly depose and say, being duly sworn, that the said petition was true, and the said schedule was accurate, according to the best of his knowledge and belief; which said oath was then and there reduced to writing, and was then and there subscribed by said Thomas Dickey, before the said John A. Pitzer, commissioner as aforesaid, who attested the same as clerk of the District Court aforesaid, and as commissioner as aforesaid.

"And the jurors aforesaid, on their oaths aforesaid, do say that the said petition is not true, and that the schedule is not accurate, in the following particulars; to-wit: The said Dickey did not include, and has not included, but willfully and corruptly refused to include in the inventory of his property, rights, and credits annexed to his schedule as a part of his petition, a debt to him, said Dickey, from Willis Stone, amounting to near the sum of ten dollars, and said Dickey has not included in his said inventory a debt to him, said Dickey, from Gilbert M. Fox, amounting to near the sum of fifteen dollars; and the said Dickey has not included in his said inventory a debt to him
*414 from Alfred *Colvin, amounting to near the sum of five dollars; and the said Dickey has not included in his said inventory a debt to him, said Dickey, from Jcb Clinkenbeard and Thomas Standiford, to the amount of near sixty-five dollars; and the said Dickey has not included in his said inventory a debt to him, said Dickey, from Stephen Cooper, of near ten dollars; and the said Dickey has not included in his said inventory a debt to him, said Dickey, from Jos. B. Teas, of near twenty dollars; and the said Dickey has not included in his said inventory a debt to him, said Dickey, from James D. Buchanan and George W. Teas, amounting to near thirty-five dollars (the same being due at the time of filing his said petition and schedule).

"And so the jurors aforesaid, on their oaths aforesaid, do say that the said Thomas Dickey has not set forth in said schedule annexed to his said petition, to the best of his knowledge, a true list of his creditors, their places of residence, and the amount due by said Dickey to each of them, and an accurate inventory of his property, rights, and credits of every name, kind, and description, and the location and description of each and every parcel thereof, his wearing apparel and that of his wife and children excepted; but the said schedule is inaccurate and false, to

the knowledge of said Dickey. And the jurors do say that the said Dickey, in manner and form aforesaid, has committed willful and corrupt *perjury;* and did falsely and corruptly swear, in said proceeding, before said commissioner, against the peace and dignity of the United States, and contrary to the statute in such case made and provided.

"L. D. STOCKTON, Dist. Att'y, P. T."

To this indictment there was a demurrer, and that demurrer was sustained by the Court, which is the only alleged error in this case.

It is not contended by the plaintiff's counsel that the offense here set forth is made indictable by the bankrupt act itself, but it is alleged to be indictable at common law, or, at least, that it is made so by the act of Congress of 1825. That statute, among other things, declares "that if any person in any case, matter, hearing, or other proceeding where an oath or affirmation shall be required to be taken or administered under or by any law or laws of the United States, shall, upon taking such oath or affirmation, *knowingly and willingly* swear or affirm falsely, he shall be deemed guilty of perjury."

Admitting the present case to come within the reach of the statute just quoted, it is very questionable whether the offense is sufficiently charged in the indictment. The act of 1825 only applies to cases where *the accused shall have *knowingly and willingly* sworn falsely. The indictment in the present case does not contain that charge in express terms. True, it is not absolutely necessary for the indictment to charge the offense in the precise language of the statute, still, the substance of the statutory definition of the offense must be contained in the indictment, and that by no remote or doubtful inference. *415

The indictment in the present instance charges the de-

fendant with having *falsely*, *wickedly*, *willfully*, *and corruptly sworn* to matters which were inaccurate and false, to the knowledge of the said defendant. Now, it would be somewhat hazardous to say that this charge coincides, even in substance, with the definition of the offense as laid down in the statute.

But, without dwelling longer upon the form, we will proceed to the substance of the indictment. We do not think the act of 1825 reaches this case. The bankrupt law, so far as this case is concerned, seems to be complete in itself, and prescribes its own penalties for violations of its provisions. The first section of that act provides for filing the petition and schedule verified by the oath of the bankrupt, according to the forms prescribed in the present case. The fourth section declares "that if any such bankrupt shall be guilty of any fraud or willful concealment of his property, or rights of property, or shall have preferred any of his creditors contrary to the provisions of this act, or shall willfully omit or refuse to comply with any orders or directions of such Court, or to conform to any other requisites of this act; or shall, in the proceedings under this act, admit a false or fictitious debt against his estate, he shall not be entitled to any such discharge or certificate." Now, the first section of the act requires the bankrupt to set forth, under oath, a list of his creditors, and also a schedule of his own property, rights, and credits, so that he cannot be "guilty of any fraud or willful concealment of his property or rights of property;" nor can he "admit a false or fictitious debt against his estate," without being guilty of a false statement equally as palpable as that for which the defendant in the present case was indicted, still, the only consequence of such an act, as fixed by the statute, is, that the bankrupt, in such case, shall not be entitled to his discharge. But the same section goes on to provide that such bankrupt shall, at all times, be subject to examination, orally or upon written

interrogatories, "*and, if in any such examination, he shall willfully and corruptly answer or swear, or affirm falsely, he shall be deemed guilty of perjury, and shall be punishable therefor, in like manner as the crime of perjury is now punishable by the laws of the United States.*"

*From all this it appears that the statute requires *416 the petition and schedule to be sworn to; that for any fraud or willful concealment of property (the real offense charged in this case), he is to be prevented from obtaining his discharge; that he may further be called upon to answer categorically to interrogations; and if, upon such interrogatories, he shall answer falsely, he shall be punished as a felon.

The statute in these particulars follows the rule of reason. The petitioner, from mere inadvertance, and without any fraudulent intent, may omit to state some of his property, rights, and credits. This would certainly not be criminal, yet circumstances might very possibly be such as to induce a jury to find fraud and an intentional misstatement where none in fact existed. In such a case the applicant would fail to obtain his discharge. It would be his misfortune, and nothing more.

But the humanity of the law, though it does not attempt to prevent all *misfortunes*, protects, by an additional barrier, from the conviction or imputation of *crime*. Before it will consign the petitioning bankrupt to the penitentiary, and render his name forever infamous, it requires that an opportunity should be given him for reflection, and that his attention should be directed to particular points by distinct and direct interrogatories; and if, when thus admonished and interrogated, he perseveres in his false statements, they may justly be presumed willful, and punished accordingly. But nothing can be gathered from the bankrupt act to show that Congress intended such extreme punishment to be inflicted for mere errors in the original schedule, although circumstances might induce the belief that such errors were intentional.

fendant with having *fal*... been adverted to, the *ruptly sworn* to matte... ...ction, after providing for to the knowledge of ... be used in the proceeding be somewhat hazar... "if any person shall falsely even in substance ...ear, or affirm in any hearing, or down in the stat... ...atter, or in any proceeding in such

But, without ... before any commissioner, he shall proceed to t... perjury," &c.

think the a... therefore, that it was the intention of law, so far ... be complete in itsell so far as it relates in itself, ... present, and not to fall back for a sanction its pro... ...the law of 1825.

filing ... the argument why was the petition and bank... ...required to be sworn to, if false swearing was not ent... ...as a crime. The same enquiry might be be... ...official oaths and many others, none of which r... ...supposed to render the affiant liable to punishment for perjury. In all these cases it is doubtless *417 the object of *the legislature to throw a moral sanction around the transaction, and such was probably the case in the requirement of the bankrupt act we have been considering. At all events men ought not to be sent to the penitentiary merely on the strength of such an argument.

With at least equal reason it may be asked why Congress should, in the bankrupt act itself, have provided punishment for false swearing in certain of the proceedings under that act, if it was their intention that all these offenses should be punishable by the act of 1825. Penal statutes should leave nothing in doubt. No man should be punished unless in accordance with the clear intention of the law. Where a statute, after enumerating certain offences, declares that a portion of them shall be punishable as perjury, the fair presumption is that the others were not intended to be so punished. The inclusion of one portion is the exclusion of the other, and as the inten-

apt act itself (the latest statute) is the are to regard in the decision of this case, we that the offence charged in the indictment is able as perjury.

ient affirmed.

BENJAMIN S. ROBERTS, plaintiff in error, *v.* SAMUEL SMITH & ARTHUR HALFERTY, defendants in error.

Error to Lee.

A judgment for a greater amount than that contained in the bill of particulars is erroneous. This would be cured by a *remittitur*, but the Supreme Court will not order that to be done.

An informal oath administered to a jury, although the informality appearing may be a clerical mistake, cannot be disregarded.

This was an action of assumpsit and attachment, instituted by Samuel Smith, who sued for the use of Arthur Halferty, against Benjamin S. Roberts. The bill of particulars appended to the declaration was for work and labor amounting to $87.50. Publication was made and proven, and property attached. And at the April term, 1843, the defendant having made default the case was submitted to a jury, "who were *impannelled and sworn *418 to assess the damages of said plaintiff at ninety-two dollars and seventy-five cents" (as set out in the record).

A judgment was rendered for that amount, and costs, against the defendant.

Roberts brought up the case upon a writ of error.

Assignment of errors.

1. The declaration in said suit and the matters therein contained are not sufficient in law to maintain the said action. Stephen's Pleadings, 304, and note to 2d appendix, page 150; 1 Chitty's Pleadings, 2.

2. There is nothing of record in the said suit showing that the said Arthur Halferty was in any manner beneficially or legally interested in the account of the said Samuel Smith, upon which said action was brought.

See authorities cited above, and 6 John. R. 318; 6 Missouri Rep.; Barnes, 239; 1 Term. Rep. 62; 2 Show. Pothier, 315, No. 130.

3. That the judgment suit in said record is entered up, and the pleadings in the case are insufficient to bar said Smith in another suit upon the same account, nothing in said record and pleadings showing that said Smith authorized said suit or assigned to said Halferty any interest or right in the account sued upon.

See same authorities and Vanness' opinion in the case of Denton *v.* Noyes, 6 John. R. 315.

4. That the judgment, record, and pleadings do not show a right of action on the part of said Arthur Halferty, who is the beneficiary in the suit. 1 Chit. Pl. 2; Stephen's Pl. 304.

5. The affidavit upon which the attachment issued does not allege that anything is due said Smith or Halferty from the defendant in the suit below, as required by statute.

6. The affidavit alleges an indebtedness of eighty-seven dollars and fifty cents, or thereabouts, and judgment was entered for ninety-two dollars and seventy-five cents, damages.

7. The jury impannelled to assess the damages were sworn to assess the damages at $92.75.

8. Notice of publication was not proved until three days after the default.

B. S. Roberts, in pro. per.

Miller & Galbraith, for defendant in error.

Per Curiam, Mason, Chief Justice.— Of all the errors assigned in this case there are only two which seem worthy

of much consideration. One of these is that the verdict was for a larger amount than that *claimed by *419 the plaintiff. The bill of particulars attached to the declaration only demanded eighty-seven dollars and fifty cents, without any claim for interest. This must limit the amount of the recovery, and the verdict for ninety-two dollars and seventy-five cents was erroneous.

It is true this would be cured by a remittitur, but as the defendant is not represented here we cannot take it upon ourselves to direct such a step to be taken.

Another error, which we think substantial, is found in the oath of the jury as set forth in the record, and though this is doubtless a clerical error, it is there and uncorrected, and we cannot disregard it.

Judgment set aside and case remanded for further proceedings.

Joseph M. Parker, plaintiff in error, *v.* Richard Stewart, defendant in error.

Error to Jefferson.

On a petition for partition of land, held in common, it is error to dismiss the petition upon the answer admitting the truth of all the allegations in the bill, but setting forth in avoidance an agreement between the parties by parol, to divide the tract in a particular manner, and tendering a deed to and demanding one from the petitioner.

Parker filed his petition for the partition of a tract of land which he claimed to own jointly with Stewart. The latter answered to the petition, confessing all the facts set out in it, and alleging further, by way of avoidance of the costs, that the petitioner had always, before the filing of the petition, refused receiving a conveyance from him for

his share of the land, although he had repeatedly offered him one, and had also refused to execute a conveyance to the defendant for his, Stewart's, half of the land, when desired to do so. To this there was a general replication; and upon the hearing of the cause at September term, 1842, the petition was dismissed, with costs.

To reverse this order, Parker sued out his writ of error, and has assigned for error:—

1. The Court erred in dismissing the complainant's bill.
2. The Court erred in refusing the partition prayed for.

*420 *3. The Court erred in trying said cause without a jury; no issue was entered on the record to be tried.

HALL & SHUFFLETON, for plaintiff in error.

GRIMES & STARR, for defendant in error.

PER CURIAM, MASON, CHIEF JUSTICE.—This was a petition for the partition of lands under the statute. All that is required by law is set forth in the petition. The answer of the defendant admits the truth of all the allegations of the petition, but sets forth in avoidance thereof an agreement between the parties to divide the tract in a particular manner. To this there is a general replication, and the whole case submitted to the Court on petition, answer, replication, and testimony. The Court dismissed the petition, whereupon an appeal was taken to this Court.

The defense set up by the defendant not being responsive to the bill, requires to be proved. The testimony fails to sustain that defense. The evidence is almost entirely limited to Parker's admissions, and those admissions prove too much. They show that the agreement between the parties was that if Stewart's share of the tract embraced any of Parker's improvement, that he, Stewart, was to convey to Parker at a stipulated price all of such improvement thus embraced; that Parker had offered to convey

in accordance with the terms of such agreement, but that Stewart had refused to do so. Having refused to comply with that agreement, he is certainly in no condition to avail himself thereof as a defense. The decision of the Court below dismissing the petition was, therefore, erroneous.

Decree of dismissal set aside and case remanded to the District Court of Jefferson county.

MARY STRATTON, plaintiff in error, *v.* SAMUEL SHINTAFFTER, defendant in error.

Error to Cedar.

The writ and recognizance, on a complaint in bastardy, should be in the name of the United States on the complaint of the female.

*This was an action of bastardy, brought in the name *421 of Mary Stratton, against Samuel Shintaffter, and the proceedings were quashed in the Court below on the following motion.

"1. That the suit is brought in the name of Mary Stratton, whereas the same should be in the name of the United States.

"2. The warrant is informal and illegal, and not authorized by law.

"3. The recognizance is not sealed by the person who signed the same, and the penalty thereof is made payable to Mary Stratton, whereas it should be made payable to the United States, &c."

To reverse this judgment the plaintiff has sued out a writ of error from this Court.

J. P. & E. COOK, for plaintiff in error.

PRESTON & HASTINGS, for defendant in error.

PER CURIAM, MASON, CHIEF JUSTICE.— The question presented in this case is relative to the proper parties to a prosecution under the bastardy act. The current of opinion in the states, under similar statutes, seems to be in accordance with the decision below, and although there seems to be no great degree of principle involved in the matter, we think the better title for a suit of this kind is, The United States on the complaint of A B *v.* C D. The case from Wright's Ohio Reports which is principally relied upon by the counsel for the plaintiff in error, would even seem to sanction such a mode of entitling the suit.

Judgment affirmed.

THOMAS DARLINGTON, plaintiff in error, *v.* JOHN C. IRWIN, defendant in error.

Error to Muscatine.

There is no authority for issuing a capias merely that it may act as the basis for an attachment when the defendant is already in Court. And a motion to quash the same may be made after a plea in abatement to the attachment (*g*).

The facts in this case are these. Darlington had sued Irwin for slander, and pending this action he filed an *422 affidavit that he believed that *Irwin would leave the territory, or remove his property before judgment in the action could be had, or that he would otherwise abscond, so that the process of the Court, after judgment, could not be issued, and prayed the Court that a

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(*g*) A *capias* issues in no civil action under the Revision of 1860.

capias might issue and he, Irwin, be held to bail. And a capias was consequently awarded, the defendant arrested, and held to bail in the sum of five hundred dollars.

The said Darlington then filed an affidavit for an attachment against Irwin, which was also ordered and property attached.

Irwin appeared in Court and pleaded in abatement to the attachment. And subsequently, by attorney, he moved to quash the writ of attachment and capias, which motion was sustained.

Darlington brings the case to this Court on a writ of error, and assigns for error :—

1. That the Court below sustained the motion of the defendant to quash the writ of attachment and capias.

2. That the Court below did quash and set aside the said writ of attachment while there was a plea in and undisposed of.

Carleton & Woodward, for plaintiff in error.

Hastings, for defendant in error.

Per Curiam, Mason, Chief Justice.— We think the capias in this case was improperly issued and the attachment resting thereon must fall with it. We know of no authority for issuing a capias merely that it may act as the basis for an attachment, and when the defendant was already in Court. It is true there may often be instances where the circumstances which would justify the affidavit necessary for the issuing of a capias only, develope themselves subsequent to the commencement of the suit, but this is a proper subject for the consideration of the legislature.

It is objected that the motion to quash was not made until after a plea in abatement to the attachment had been filed. This, at all events, would be no objection to a mo-

PRESTON & HASTINGS, for def[illegible]nfall of this carried the [illegible]here be an attachment in [illegible]e amonnt of bail, and con-[illegible]h the writ of attachment may [illegible]ed by statute?

PER CURIAM, MASON, CHIF[illegible] sented in this case is rela[illegible] prosecution under the br[illegible] ion in the states, unde[illegible] cordance with the de[illegible] to be no great deg[illegible] we think the bet[illegible] States on the [illegible] Wright's Ohi[illegible] the counsel [illegible] sanction [illegible] Judgr[illegible]

THOMAS B. JOHNSON AND OTHERS, plaintiffs in error, v. THE UNITED STATES, defendant in error.

Error to Muscatine.

The act of Congress of the 28th of February, 1799, is the only act regulating the fees of marshals of territories; the act of 1841 relates only to the sum allowed for summoning the jury.

The plaintiff in error must not only show error, but he must show *those* errors which have done him substantial injury, before he can *ask for* a reversal of the judgment below (*h*).

This was an action of debt brought by the United States *against* Thomas B. Johnson and his securities, as marshal *of the* territory of Iowa. Judgment was rendered against *defendants* in the Court below. During the trial the fol*lowing* bill of exceptions was sealed:—

"Be it remembered, that on the trial of this cause upon the 26th day of June, 1844, being an adjourned day of the April term of the District Court of Muscatine county, it became a material question which of the several acts of Congress regulated and fixed the compensation and fees which a marshal of this territory is entitled to, the Court charged the jury that the act of Congress passed the 28th

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(*h*) See Fanning *v.* McCraney, *ante*, 398, note (*b*).

...July act of Congress regulating ...s and charges which a marshal of ...itled to for his services at this time, ...ngress, passed the 3d March, 1841, was ...limit the ultimatum of the marshal's fees ...g all the jury at any one term, to thirty dol... of fifty dollars, by the provisions of the first ... The Court also charged the jury that the examin...nd allowance by one of the judges of this territory, ...ervices rendered the government, and a certificate from ...ne of the clerks of the Court, that such services were rendered, did not amount to a *prima facie* evidence of the rendition of said services by the marshal, so as to throw the burthen of the proof on the government or the other party, to all of which ruling and charging of the Court the defendant, by his counsel, excepts and prays the Court to sign this, his bill of exceptions, which is accordingly done.

"J. WILLIAMS, *Judge.*"

*LOWE & HASTINGS, for plaintiffs in error. *424

DESHLER & WOODWARD, for defendant in error.

PER CURIAM, MASON, CHIEF JUSTICE.— On the first point as set forth in this bill, we think there was no error in the charge of the Court; at least none which is shown to have been material. We think the act of 1841 does not in any respect affect the fees of the marshal of this territory. That act, so far as it relates to the marshal's fees, was made for the states, and for them only. No allusion is made therein to the territories, and by analogy to decisions under statutes of a similar character in this respect, is only applicable to the states.

It is true our organic act, taken in connection with the organic act of Wisconsin, gives to our marshal the same fees as are allowed to the marshal of the northern district of New York, but this we believe refers to the fees of that

officer *as then allowed.* No change can be made in the fees of the marshal of this territory, except by a statute made applicable to him directly. The act of 1841 would not even limit the fees of our marshal to thirty dollars for any one term, as the Court below seemed to intimate, but even if there was error in this, there is nothing on the record to show any materiality in such error.

The other charge in relation to the force and effect of a judicial certificate of services rendered by the marshal, is not shown to be material, and the exception thereto would be unavailing, however erroneous it might have been. If made in relation to charges for transporting funds as stated in the notice of set-off of the defendant below, the instruction of the Court was correct. But if made in relation to any matters embraced in the fourth section of the act of May 8, 1792 (1 Story's laws, 259); we think the instruction was erroneous. It is the business of the plaintiff in error to make out a full case. He must not only show errors, but he must show those which have done him substantial injury before he can ask for a reversal of the judgment below. Failing to do so in the present case, the judgment below will be affirmed.

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*425 *ALPHEUS WIGHT *v.* ISAAC Z. SHUCK.

Appeal from Louisa.

A note payable two years after date, "to bear interest at fifty per cent from due until paid" is not usurious (i).

This was a bill to foreclose a mortgage to secure the payment of the note set forth in the opinion. The bill was

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(i) Approved and followed in Gower & Holt v. Carter & Shattock, 8 Iowa, 244; Wilson v. Deon, 10 Iowa, 432.

dismissed for the want of equity, and an appeal taken to this Court.

SPRINGER & LOWE, for plaintiff.

ROBER, for defendant.

PER CURIAM, MASON, CHIEF JUSTICE. —The first question to be considered in this case is, whether the contract was usurious. The note filed as an exhibit and for the payment of which the mortgage was executed, reads as follows: —

"Two years after date, I promise to pay A. Wight, or bearer, the sum of three hundred dollars, lawful money of the United States, for value received, to bear interest at fifty per cent from due until paid.

"ISAAC Z. SHUCK."

We think there was no usury in this contract. If the maker paid the money at the end of two years, no interest is to be paid at all. It would be contrary to all reason and justice to allow him to violate his agreement by not paying at that time, and then set up a consequence of his own breach of the contract as a protection against all liability thereon. The authorities cited by the defendant, especially 8 Bacon's Abridgment, 515–6, are directly in point, and conclusive. Chitty, in his work on contracts, also enters into a full description of this subject and comes to a like conclusion. See Chitty on Contracts, 235.

Upon the other point, whether if usurious it would have vitiated the whole contract, the authorities are conflicting. Not feeling fully satisfied as to the true rule on that subject, we shall leave that question open until a case shall arise rendering its decision necessary.

The decree of the Court below will be reversed, and the case remanded for further proceedings.

*426 *Benjamin S. Roberts *v.* Samuel Smith and Alfred Halferty.

Appeal from Lee.

If a suit at law should be brought by A for the use of B, against C, during the absence of A, and without authority from B, and judgment had, C would have equitable grounds to enjoin the judgment.

The only point incidentally determined and the facts of the case are set forth in the opinion of the Court.

At the October term, 1844, of the District Court of Lee, the following decree was made in this cause:—

"On this day came the said complainant by B. S. Roberts, his solicitor, and the said defendants by D. F. Miller, their solicitor, and after argument of said counsel, it is ordered, adjudged, and decreed by the Court that the injunction in this suit be dissolved, and that execution issue in this suit for costs, as a suit at common law."

From which the complainant appealed to this Court.

Per Curiam, Mason, Chief Justice.—This was a bill filed to enjoin proceedings at law in a suit brought in the name of Smith for the use of Halferty, against Roberts, the complainant. The only matter set forth in the bill which, if true, would entitle the complainant to relief, is the allegation that the suit was brought in the absence of Smith, and without any authority from him, and that Halferty had no such interest in the claim sued upon as to entitle him to institute the suit in that manner. No irregularity, or even error, apparent upon the record, will support this proceeding, for in such cases the law has provided a different and an adequate remedy.

But the above allegation in the bill is met by a denial in the answer of the defendant, Halferty, who states that the account on which the suit at law was instituted had been

duly assigned to him for a valuable consideration, and this allegation is supported by the testimony. This gave him a right to sue in that form. The decree of the Court dismissing the bill was, therefore, correct, and must be affirmed, which is accordingly done.

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*Samuel Shuffleton and John A. Pitzer *v.* *427 George W. Jenkins.

From Jefferson.

Where the condition of a title bond is that the deed is to be made, provided that the money is paid by a particular day, and the money is not paid, the bargainee cannot file his bill for a specific performance. Time is the essence of such a contract (*j*).

This was a bill for the specific performance of an agreement for the conveyance of the east half of S. W. quarter of the N. E. quarter of section 25, township 72, N. of R. 10 W. The bill alleges that on the 13th of March, 1843, the said defendants executed to complainants a bond conditioned to convey to said complainants on or before the 7th of April, 1843, the said land, provided that the complainants should pay the said defendant, on or before the day specified, the sum of $25.00. The bill further alleges that the defendant, at the time of executing said bond, was in the employ of one E. Manning, and that said defendant should have said that he borrowed said sum of money from his employer to enter the land; that the complainants wait-

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(*j*) When time is of the essence of the contract, see Garretson *v.* Vanloon, 3 Gr. 128; Armstrong *v.* Pierson, 5 Iowa, 317; Davis *v.* Stevens, 3 Iowa, 158; Young *v.* Daniels, 2 Iowa, 126; Tomlinson *v.* Smith *et al.* *ib.* 39; Usher *v.* Livermore, *ib.* 117; Brink *v.* Morton, *ib.* 411; Mathews *v.* Gilliss, 1 Iowa, 242.

ed on said Manning, who informed them that he should not want the money until he should start east to purchase goods, and that about the time said Manning had mentioned, the complainants again waited on him and expressed a wish that defendant should make a deed to said land, and hand the same to one Cornelius Keifer, who would pay said defendant the consideration money. The bill further states that the deed was not executed, nor the money called for, as they had proposed to said Manning.

The bill further alleges that on the 30th August, 1843, a tender of said money was made to defendant, and a deed demanded, which was refused.

The bill concludes with a prayer for a specific performance.

The defendant demurred, because,—

1. The complainants did not show by their bill that they complied with the condition of said bond.

2. Complainants did not show by their bill that they obtained an extension of the time on said bond from said Jenkins.

3. Complainants did not show that said Manning agreed to give an extension of time for the payment of said sum of money.

*428 *4. Complainants did not show by their bill that Keifer ever waited on said defendant and tendered to him said sum of money and demanded said deed.

5. That said bill did not show a mutuality of contract between said parties.

The demurrer was sustained, and the complainants seek to reverse the decision in the Court below on a writ of error.

Errors assigned: —

1. The Court below erred in dismissing complainant's bill.

2. The Court erred in dismissing complainant's bill.

HALL & MILLS, for plaintiffs.

NEGUS & ACHISON, for defendant.

PER CURIAM, MASON, CHIEF JUSTICE. — We think in this case that time was of the essence of the contract. The condition of the bond was that the deed was to be made, provided the money was paid by a particular day. Had any part of the purchase money been paid, or had any note or other security for the payment of the money been given to the defendant, the case would have presented a very different aspect. But as the case stands, the obligation is all upon one side. If they pay the money by the time specified, he is to make the deed, but there is nothing to compel them to pay the money. It would be wholly unjust to allow them to hold this contract over the head of Jenkins for an indefinite period of time, to be enforced if the lands increase in value, and to be neglected if they should decrease.

The complainants will have sustained no injury from the rescission of the contract. They have paid nothing; they are bound for nothing. They have failed to pay the money by the day stipulated and they show no equitable grounds for the interference of a Court of chancery.

The decree of the Court below will be affirmed.

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*JOHN CAROTHERS *et al.* plaintiffs in error, *v.* *429 WILLIAM GREEN, defendant in error.

Error to Johnson.

Where a true copy of the note sued upon is appended to the declaration, a variance in the description in setting out the same cannot be taken advantage of upon a writ of error.

This was an action of assumpsit on a note for two hundred dollars, brought by Green against John, William,

James, and H. Carothers. The note was payable to E. J. Kidder, or bearer. Judgment was rendered at January term, 1843, for the plaintiffs for $282.

On the trial the defendants objected to the introduction of the note on account of a variance between said note and the note described in the declaration, which objection was overruled by the Court, and the note admitted as evidence in support of the plaintiff's special count. To which the defendants excepted.

John Carothers sued out his writ of error from this Court.

HASTINGS, for plaintiffs in error.

LOWE, for defendant in error.

PER CURIAM, MASON, CHIEF JUSTICE. — Although several errors are assigned in this case, only one has been insisted on in the argument. It is urged that the note ought not to have been received in evidence on account of a variance. There is no variance between the note and the copy appended to the declaration, and we have often held that where such is the case no objection can be made on the trial on account of a variance between the note described in the declaration and that offered in evidence.

Judgment affirmed.

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*430 *HOSEA W. GRAY, plaintiff in error, *v.* LEWIS D. PHILLIPS, for the use of Kenedy, defendant in error.

Error to Linn.

A judgment may be rendered without any finding for the plaintiff by the Court upon the issue joined.

Hosea W. Gray *v.* Lewis D. Phillips.

Where the whole matter is submitted to the Court, there seems no necessity of making a formal report from itself to itself.

The verdict of the jury is for the purpose of informing the Court for which party and for what amount to render judgment.

Where a nominal plaintiff assigned away all his interest in the note sued on, it was held not sufficient to defeat the action. The objection could only serve as the basis of a motion to secure costs.

The holder of a note endorsed in blank has a right to sue in the name of the blank endorser for his use.

An endorsement upon a note which is not material to the success of the action, need not be set forth in giving a copy of the instrument. But where the suit is brought by the endorsee against the maker, the endorsement is a material part of it, and must be set forth (*a*).

This was an action of assumpsit brought by Lewis D. Phillips for the use of Samuel H. Kenedy against Hosea W. Gray, upon a note, of which the following is a copy: —

"By the first day of January, A. D. 1842, I promise to pay to A. Timmons the sum of one hundred dollars.

"H. W. GRAY.

"March 17, 1841."

Endorsed, "John Ridgeway, without recourse on me, A. Timmons — pay Lewis D. Phillips, J. Ridgeway."

The declaration contained two special counts, but no plea appears of record.

At September term, 1843, the record shows that the parties appeared by their attorneys and agreed to submit both the lawand the fact to the Court, "Whereupon, an issue being joined, the Court, after being fully advised in the premises, by hearing the testimony offered upon both sides, and the argument and allegations of the counsel, it is considered by the Court that the plaintiff have and recover of the defendant the sum of one hundred and eight dollars, his damages," &c.

*The bill of exceptions shows that when the case *431 came on for trial, the right to a jury was waived by

(*a*) See Conyngham *v.* Smith, 16 Iowa, 471; Cottle *v.* Cole & Cole, 20 Iowa, 485; Rice *v.* Savery, 22 Iowa, 470.

both parties, and that on the trial the plaintiff produced the note, and the introduction of which was objected to on the ground of variance, and that the endorsement by Phillips showed that the plaintiff had no legal interest in the note. That the plaintiff's counsel sent for Phillips to prove that his whole interest in the note did not pass by his endorsement, and before he came in, moved to strike out the endorsement of Phillips, which motion being undetermined, they did not do at the time, but called Lewis D. Phillips, the last endorser, who upon examination by them, testified that he had parted with all his interest in said note, and that he placed his name thereon with the intention and for the purpose of transferring the same, and that he then had no interest in said note. The plaintiff then urged his motion for leave to strike out the endorsement of Phillips, to which the defendant objected, and the Court permitted the endorsement to be stricken out, and received the note in evidence, to which the defendant excepted.

The defendant below brings the case here upon a writ of error.

David, for plaintiff in error.

Gilbert, for defendant in error.

Per Curiam, Mason, Chief Justice. — The errors assigned in this case are: —

1. The judgment was rendered without any finding for the plaintiff by the Court or a jury, upon the issue joined in the Court below.

2. The judgment was rendered without any assessment by the Court, the clerk, or a jury, of the damages sustained by the plaintiff below.

3. The note produced in evidence ought to have been rejected, as there was a material variance between the same and the copy filed with the plaintiff's declaration.

4. The Court erred in permitting the endorsement of

Phillips, the last endorser of the note produced in evidence, to be stricken out.

5. The Court erred in receiving the note in evidence after it had been shown by the plaintiff's evidence that the plaintiff on record had no legal or beneficial interest therein.

6. The Court erred in the rendition of the judgment upon the note and the other evidence.

The two first are founded upon the fact that no formal verdict was rendered in the case. After stating that the case was submitted to the *Court, the record pro- *432 ceeds, "Whereupon, an issue being joined, the Court, after being fully advised in the premises by hearing the testimony offered on both sides, and the arguments and allegations of counsel, it is considered by the Court that the plaintiff have and recover from the defendant the sum of one hundred and eight dollars, his damages herein," &c.

The verdict of the jury is for the purpose of informing the Court for which party and for what amount to render judgment. Where the whole matter is submitted to the Court, there seems no necessity of making a formal report of this kind, from itself to itself. We do not think, therefore, that there has been any substantial error committed in this respect.

The objection that the nominal plaintiff had assigned away all his interest in the note was not sufficient to have defeated the action. See Gage *v.* Kendall, 15 Wendell, 640, and Lovell *v.* Evertson, 11 Johnson, 52. This could only serve as the basis of a motion in behalf of Phillips, to require Kenedy to indemnify him against liability for costs.

We think, too, that there was no substantial variance between the note declared upon and that offered in evidence, prior to erasing the blank endorsement of Phillips. Whether such endorsement was upon the note or not, was wholly immaterial to the success of this suit. Without

such endorsement, the present form of the action would have been clearly regular. With such endorsement, while in blank, the holder has a right to sue in the name of the blank endorser for his own use. Sater *et al. v.* Hendershott, decided at July term, 1841, and Temple *v.* Hays & Hendershott, decided at December term, 1839.

Now an ondorsement upon a note which is not material to the success of the suit, need not be set forth in giving a copy of the instrument. When suit is brought by the endorsee against the maker, the endorsement is a material point of the instrument, and must be set forth, or the copy is incomplete, and may be objected to for a variance, but not where the endorser himself sues the maker. The erasure of the blank endorsement, therefore, whether strictly right or wrong, was no substantial error. Being an immaterial act, it is no ground of reversal.

Judgment affirmed.

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*433 *William R. Kerr *v.* Robert Stuart.

Certiorari to Muscatine.

An entry by the clerk in the Court below of facts, either proved or admitted, is no legitimate testimony for the guidance of the Supreme Court (*b*).

This was an action of assumpsit before a magistrate, and appealed to the District Court. The record states that "This cause coming on to be heard by the consent of the parties, the same is submitted to the Court. The Court is of opinion that the plaintiff ought not to recover in this form of action, and direct a non-suit." Judgment against the plaintiff for costs.

(*b*) As to what constitutes the record in a case, see Revision of 1860, §§ 3512, 3140, 345, 346.

There is then a statement in the record of the testimony, but it is not embodied in the usual form (a bill of exceptions), signed and sealed by the judge.

WHICHER, for plaintiff.

HASTINGS & WOODWARD, for defendant.

PER CURIAM, MASON, CHIEF JUSTICE. — The argument of the counsel for the plaintiff in error in this case is entirely without a basis. The facts upon which it stands do not appear in such a manner that we can recognize them. An entry by the clerk of facts, either proved or admitted, is no legitimate testimony for the guidance of this Court. The law has pointed out the manner of informing the appellate Court of all proofs or admissions made in the Court below. The entry by the clerk in this case is only a bill of exceptions, without that authentication which the statute prescribes. The signature and seal of the judge is wanting, and, therefore, is not such a record as we can acknowledge.

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*DAVID D. EDGAR, plaintiff in error, *v.* WILLIAM *434 CALDWELL, defendant in error.

Error to Jefferson.

A bill of exceptions will be stricken from the record unless the record shows that the judge *refused* to sign it (*c*).

If a constable levies on a horse belonging to A and B, for a debt due from A to the plaintiff, he should sell only the share of A. The sale of the whole horse makes the constable a trespasser *ab initio;* and B may maintain trover or trespass at his election (*d*)

(*c*) See Revision of 1860, § 3110.

(*d*) See Rev. § 3190; Parson on Part. 474, note.

David D. Edgar *v.* William Caldwell.

This was a suit instituted by Edgar against Caldwell before a justice of the peace, for damages, for the taking from the plaintiff's possession a horse, and judgment against the defendant was rendered for $19.50 damages and costs. The defendant appealed to the District Court. At September term, 1844, the defendant moved to dismiss the appeal, because the amount sued for exceeded the jurisdiction of the justice, which motion was overruled. The plaintiff then moved the Court to dismiss, first, because of insufficient appeal bond; second, because the security was not sufficient; and it was ordered that the defendant show cause, &c.

The case was submitted to a jury, and on closing the testimony on the part of the plaintiff, the defendant moved for a non-suit, which was granted, and a judgment rendered against the plaintiff for costs. On the trial the plaintiff introduced witnesses and proved that the defendant, when acting as a constable, under an execution issued by Judd, a justice of the peace, against Isaac Bush and L. T. Gillet and others, that he went to the premises where the plaintiff, said Gillet, resided (both were absent from home), and levied said execution upon a light bay horse, the same for which suit was brought. That said horse was brought by Gillet and plaintiff from Illinois, and they were joint owners of said horse, and used said horse in common, and lived upon the same farm. That the constable levied upon the horse taken from said premises, advertised and sold the same to satisfy the execution. That said horse was worth thirty-five or forty dollars. The plaintiff here rested his case. Whereupon the defendant moved the non-suit aforesaid, on the ground that the constable was liable in this action for levying upon and executing property in which Gillet, execution debtor, had an interest which was sustained, and the plaintiff excepted, and the judge signed the bill.

*435 *Then follows a bill of exceptions attested by bystanders, which it is unnecessary to set forth.

David D. Edgar *v.* William Caldwell.

The plaintiff below sued out a writ of error from this Court.

Errors assigned: —

1. The Court below erred in granting the non suit.

2. In deciding that a constable was not liable to an individual partner in trespass for carrying away and selling partnership property.

3. In entering judgment for the defendant.

And now comes the defendant in error, by Hall, his attorney, and moves the Court to strike from the record the bill of exceptions filed in this case, attested by by-standers, for the following reasons: 1. The record shows that the Court did sign a bill of exceptions. 2. The record does not show that the bill of exceptions was even presented to the Court below for allowance, or that the Court even refused to sign the same. 3. The Court never refused to sign the bill of exceptions.

Negus & Gray, for plaintiff in error.

Hall & Mills, for defendant in error.

Per Curiam, Wilson, Justice.— In this case the motion to strike out the bill of exceptions signed by by-standers is sustained, as it nowhere appears that the judge *refused* to sign it.

The judgment of the Court below is reversed. The case should have been submitted to the jury. Although the constable might seize the whole, yet he ought to have sold but the share of the judgment debtor. The subsequent sale of the whole horse made him a trespasser *ab initio*; and the other part owner may maintain trover or trespass at his election. *Vide*, 15th Mass. Rep. 82, Melville *v.* Brown.

Judgment reversed.

*436 *ROBERT G. ANDERSON, guardian of William P. Anderson, a minor, plaintiff in error, *v.* JAMES CAMERON, HENRY M. VANCE, and ROBERT RALSTON, impleaded with, and survivors of, James Anderson, deceased, defendants in error.

Error to Des Moines.

The statute which allows guardians the right to demand, sue for, and recover all moneys belonging to their wards, from executors and administrators, as soon as the same may be collected, does not authorize them to institute suit in their own names upon administrators' bonds, for a failure to perform the orders of a probate judge.

This was an action of debt brought by the plaintiff against the defendants in error, upon an administrators' bond. The declaration set out the bond, and an order of the Probate Court that the administrator should distribute the moneys in his hands belonging to the estate of said James Anderson, deceased, or their legal representatives, and among other things, that said James Anderson should pay out of said moneys to said William, a minor, one of the legal heirs of said James Anderson, Sr. deceased, the sum of $247.00. Assignment of breach, &c. To the declaration the defendants demurred, which demurrer was sustained by the Court, and the suit dismissed at the plaintiff's costs.

The plaintiff sued out his writ of error from this Court.

GRIMES & STARR, for plaintiff in error.

RORER, for defendants.

BY THE COURT.— The bond which is the foundation of the action in this case was an administration bond, given by James Anderson, Jr. as principal, and the defendants as securities, the said James Anderson, Jr. having been

appointed administrator of the estate of James Anderson, Sr. The bond was given under the statute of Michigan, which, at the date of the bond, was in force in the territory of Wisconsin, and is dated in May, 1838. (See Revised Statutes of Michigan, 1833, page 310.) The bond is in strict conformity with that statute. The statute of Michigan, entitled "An act for regulating the proceedings on probate bonds in the Courts of common law, and directing their form in the *Supreme Court," sec- *437
tion 1, sets forth that "When it shall satisfactorily appear, upon a hearing of an administration bond, for whose particular use and benefit the money for which execution issues is to enure, the judgment shall be rendered, that the plaintiff in his said capacity (naming him) now have execution for ———, being part of the penalty forfeited, and costs taxed, at ———, the county of S. (addition) a creditor or heir of E. F. deceased (as the case may be), and the person to whose use judgment shall be rendered, in the name of the judge of probate as aforesaid, may sue out execution," &c. The 2d section sets forth what is necessary to be done when the suit is brought against the administrator for the benefit of the heir. If this statute be operative, the suit should be brought in the name of the judge of probate (the payee in the bond) for the use of the person claiming the money from the administrator. The legislature of Iowa enacted a law upon the subject of administration upon the estate of intestates, which was approved January 25, 1839, and took effect the first of May following. This latter act repealed all laws coming within the perview of it, but did not contain anything in it contrary to the Michigan statute, which required the suit to be brought in the name of the payee of the bond, for the use of the person interested. The Michigan statute was not, therefore, affected by it. On the 30th of July, 1840, a law was enacted by the legislature of Iowa, repealing all laws of the territories of Michigan and Wisconsin which were

in force in the territory of Iowa on the 4th of July, A. D. 1838. The latter act contains several provisions, among which are the following: —

"Section 4. The repeal of any statuary provision shall not affect any act done, or right accrued or established, or any proceedings, suit, or prosecution had or commenced previous to the time when such repeal shall take effect, but every such right, act, and proceeding shall remain as valid and effectual as if the provision so repealed had remained in full force."

On the 25th of January, 1839, the legislature, by an act entitled "An act concerning minors, orphans, and guardians," section nine, enacts that "Guardians shall have power to demand, sue for, and recover all moneys belonging to their wards, from executors and administrators, as soon as the same may be collected, or of any other person in whose hands or possession the same may be," &c. This is the statute relied upon by the plaintiff in error, as authority for bringing this suit in its present shape. The following questions are presented in this case: first,

whether the act authorizing the act last referred to
*438 is to be construed as authorizing the *guardians to
sue without using the name of the payee in the bond; secondly, whether the legislature could rightfully pass such a law.

We have no doubt of the power of the legislature to pass a law of this character wherever their intention to do so is clear and explicit. But such is not the case in the present instance. The statute cited by the plaintiff in error as having such an effect, merely gives guardians the right to demand, sue for, and recover all moneys belonging to their wards, from executors and administrators, as soon as the same may be collected. Now this is not strictly a suit brought to recover moneys collected by the administrator, for there is no allegation that any such moneys have come into his hands. It is a suit brought upon the bond for a

failure to perform one of the orders of the judge of probate. If the statute had declared that for a breach of the administrator's bond, resulting in injury to his ward, the guardian should have power to sue in his own name, this suit would have been properly brought. But by no reasonable construction can the present statute receive such an interpretation.

Judgment below affirmed.

WILLIAM F. STARR and WILLIAM S. BURGESS, plaintiffs in error, *v.* CLAIBOURN WILSON, defendant in error.

Error to Jefferson.

Where there is a plea in abatement to the jurisdiction of the justice of the peace who tried the cause below, and the parties afterwards go to trial on the merits without any disposition being made of the plea, the defendant pleading it cannot reverse the judgment because the plea was undisposed of.

If a defendant wishes to take any advantage of a plea in abatement, he should call it up before going to trial upon the merits.

A "claim" on the public lands is a good consideration for a contract.

Wilson sued Starr and Burgess before a justice of the peace, and a judgment was had for the plaintiff for $50 and costs. The defendants appealed to the District Court.

At the September term, 1843, Wm. S. Burgess pleaded in abatement to the jurisdiction of the justice of the peace who tried the cause below.

At the March term, 1844, the parties appeared by their attorneys, and *the cause being submitted to *439 the Court, a judgment was rendered against the defendants and the security in the appeal bond for fifty dol-

lars and costs. The record showing no disposition of the plea in abatement.

The defendants below brought up the case on a writ of error.

Errors assigned: —

1. The Court erred in overruling the plea in abatement of one of the defendants in the Court below, and giving judgment in favor of the plaintiff.

2. In giving the judgment aforesaid in favor of the said plaintiff in the Court below, without first having decided and disposed of the plea in abatement of one of the defendants.

3. In giving the judgment aforesaid against the defendants upon a written agreement, the consideration of which is a claim on the public lands, a consideration void in law.

J. B. Teas, for plaintiffs in error.

Hall, for defendant in error.

Per Curiam, Mason, Chief Justice.—This cause came into the District Court by appeal. A plea in abatement to the jurisdiction of the justice who tried the case below was filed, and without any disposition being made of that plea, the parties went into a trial on the merits. If the defendants below wished to take any advantage of their plea in abatement they should have called it to the notice of the District Court before going to trial on the merits. Their own negligence cannot be made the cause of reversing the judgment.

No want of consideration is made apparent in the record.

Judgment affirmed.

ALONZO CHILDS & Co. plaintiffs in error, *v.* ROBERT C. RISK, defendant in error.

Error to Washington.

A summons, or other writ, is no part of the record unless made so by a bill of exceptions (*e*).

*This was an action of debt, brought by the *440 plaintiffs against defendant. A summons issued the 16th March, 1844, returnable to April term, and the sheriff returned the same served. And, on motion, it was ordered that an alias summons issue, returnable to next term in course. An alias summons issued on the 1st June, 1844, returnable to the September term, which was also returned served. Churchman as *amicus curiæ*, moved the Court to quash the writ and abate the suit, because said writ was irregularly issued, there being no prior writ upon which to base an *alias*. The record shows another motion to quash, and under this motion the writ appears to have been quashed, and a judgment against the plaintiffs for costs. This is all the record shows upon the points raised.

Childs & Co. sued out a writ of error from this Court.

Errors assigned: —

1. The Court erred in quashing the first summons issued in the case.
2. In quashing second summons.
3. In dismissing the suit.
4. In rendering judgment for defendant below for costs.

HALL, for plaintiffs in error.

The plaintiffs filed their precipe and declaration, and is-

(*e*) See note (*b*) on page 433.

sued a summons which was not sealed by the clerk, which was duly served upon the defendant. At the return term it was discovered that there was no seal on the summons and it was set aside, and the Court ordered an alias summons.

The clerk accordingly issued a second summons, in which is recited (differing from the ordinary summons) "As you have been heretofore commanded," which was duly served, and returned at the next term; at which term a motion was made *amicus curiæ* (no person appearing for the defendant) to set aside the said summons. He contended that the first summons was not so far a nullity as to be absolutely and unconditionally void, that it might have been amended; statute of jeofails cited. If it could be amended, why not order it amended by issuing another writ, or a writ *de novo*. The second summons is good as an original summons, the statute of jeofails cures it. 2 Scammon's Reports, 9–77.

CARLETON, for defendant in error.

The summons is no part of the record, unless made so by a bill of exceptions. Stephens on pleading, 23; *441 Shield *v.* Cunningham, 1 *Blackford R. 86; Henton *v.* Brown, 1 Blackford, 429; Hays *v.* M'Kee, 2 Blackford, 11.

PER CURIAM, WILSON, JUSTICE.—The authorities cited by the counsel for the defendant in error show conclusively that a summons or other writ is no part of the record, unless made so by a bill of exceptions. There being no bill of exceptions in this case, there is no record of those matters which are illegal as errors. The judgment below is therefore affirmed.

JAMES W. WOODS, plaintiff in error, *v.* THE COMMISSIONERS OF VAN BUREN COUNTY, defendants in error.

Error to Van Buren.

When, by an agreement of the parties, the jury had leave, after agreeing on their verdict, to seal the same and seperate, which was done, and eleven of the jurors returned said sealed verdict, it was held to be a waiver of all exceptions because of such separation (*f*).

This was an action brought by Woods, an attorney at law, against the defendants, for professional services. And the following bill of exceptions taken at September term, 1843, will sufficiently show the history of the case:—

"Be it remembered, that on the trial of this cause, by the agreement of the parties, the jury had leave, after agreeing to their verdict to separate; which was accordingly done. And afterwards eleven of the jury returned into Court with said sealed verdict, and the parties agreed to receive said sealed verdict from the eleven present; that said verdict was handed to the clerk and by him opened and read, which was as follows: 'We, the jury find that the order of the county commissioners, for fifteen dollars, was a payment in full to plaintiff.' And thereupon the plaintiff moved the Court to set the verdict aside, and grant a new trial; which the Court refused to do. And the defendant moved to amend the verdict so as to render a judgment against the plaintiff for costs, which the Court also

(*f*) When, by consent of parties, the jury is allowed to seal their verdict and separate before rendering the same, such sealing is equivalent to a rendition and recording thereof in open Court, and the jury in such case cannot be polled or permitted to disagree thereto, unless such a course has been agreed upon by the parties in open Court, and entered on the record. Rev. § 3075; Miller *v.* Mahon, 6 Iowa, 456; Bass *v.* Hanson, December term, 1859, unreported.

refused, and ordered the eleven jurors to retire to
*442 their room and *await their fellow juror; and afterwards the jury, consisting of twelve, came into Court with the following verdict: 'We, the jury, find for the defendants.' Which said last verdict was received by the Court; to all of which the plaintiff excepts," &c.

Woods brings the case here on writ of error.

Errors assigned:—

1. The Court erred in permitting the jury to change the verdict after they had separated, in manner set forth in plaintiff's bill of exceptions.

2. The Court erred in not setting aside the verdict of the jury, upon plaintiff's motion, after they had returned their sealed verdict.

3. And the Court erred in sending out the eleven jurors to make a new verdict after they had made up their verdict and separated, as stated in the bill of exceptions.

HALL & ROBER, for plaintiff in error.

GRIMES & STARR, for defendants in error.

BY THE COURT, WILSON, JUSTICE.—The agreement of the parties that the jury, after agreeing to a verdict, might seal the same and separate, and to receive the verdict of the eleven jurors, was a waiver of all exceptions because of such separation, and placed the cause in the same situation as though the twelve jurors had delivered it. Had the twelve jurors delivered it, no one would question the authority of the Court to direct them to retire and put it in proper form. The statute authorizes the Court itself to put verdicts in proper form. As there is no complaint of improper conduct on the part of the jurors, the judgment of the Court below is affirmed.

Aaron Burkadink, plaintiff in error, *v.* John Martin Baker, defendant in error.

Error to Washington.

Where the bill of exceptions alludes to papers not set out in the record of the case from the District Court, they cannot be considered. The Supreme Court cannot go out of the record and will not notice papers thus referred to (*g*).

*This was an action of debt brought by the plaintiff *443 against the defendant on a promissory note.

Peas, 1. Nil debit. 2. Duress of imprisonment. 3. Note was obtained by fraud. 4. Want of consideration. 5. Failure of consideration. 6. Set-off. Judgment against the plaintiff for costs at the September term, 1844. The following bill of exceptions was sealed.

"Be it known, that on the trial of this cause the plaintiff gave in evidence to the jury the note (here insert the copy of the note given in evidence) and rested his case. The defendant proved that the note was given to plaintiff by defendant on the settlement of a case of bastardy (here insert the copy of the affidavit, warrant, and proceedings before the justice who tried the case), and proved that the said note was given to settle the said cause, and whilst the defendant was in custody by virtue of the warrant. It was also proved that on the day succeeding the day on which this note was given, and after the defendant was discharged from the arrest, the parties met, and in

(*g*) As to what is requisite in a bill of exceptions, see Rev. §§ 3106, 3107, 3109; Armstrong *v.* Pierson, 15 Iowa, 476; Davenport G. L. & C. Co. *v.* City of Davenport, 13 Iowa, 238; Lyons *v.* Thompson, 16 Iowa, 62; Shepherd *v.* Brenton, 20 Iowa, 41; State *v.* Lyon, 10 Iowa, 340; State *v.* Hockenberry, 11 Iowa, 269; Moffit *v.* Rogers, 15 Iowa, 453; Mosier *v.* Hull, *ib.* 603; and many other cases of like import.

addition to the note, a full settlement of all other matters was had between them.

"Upon this state of the evidence the jury, by consent, returned a verdict for the plaintiff, subject to the opinion of the Court upon the above facts. The Court decided that the plaintiff could not recover, and rendered a judgment against him, to which opinion the plaintiff excepts, and prays the Court to sign and seal this bill of exceptions.

"J. WILLIAMS, *Judge* [SEAL]."

Burkadink brought the case up upon a writ of error.

HALL, for plaintiff in error.

CARLETON, for defendant in error.

PER CURIAM, WILSON, JUSTICE.—The bill of exceptions in this case alludes to papers, warrants, &c., in this way (here insert). These refer to warrants, affidavits, transcripts and other proceedings before a justice of the peace, we presume, but what justice of the peace, what warrant, what suit, does not appear any where in the record. Whether the imprisonment was legal or illegal does not appear. We cannot go out of the record, and from it there appears to be no error. It has been decided at this term of the Court in the case of Childs & Co. *v.* Risk, upon authority, that where papers are referred to in this way the Court will not take notice of them.

Judgment below affirmed.

*WILLIAM S. M'KNIGHT and LAWRENCE MALONEY, plaintiffs in error, *v.* THE UNITED STATES, defendant in error. *444

Error to Dubuque.

A bond made payable to the United States, and taken by a justice of the peace, from a prisoner arrested for an assault with an intent to kill, conditioned for the defendant's appearance in his Court, and continued at the defendant's instance, to procure testimony in defense, is collectible in an action of debt, in the name of the United States, on proof of the obligor's default.

This was an action of debt instituted in the name of the United States by the board of commissioners of Dubuque county, against William S. M'Knight and Lawrence Maloney, on a bond, of which the following is a copy:—

"We, the undersigned, William M'Knight, as principal, and Lawrence Maloney as security, are hereby held and firmly bound unto the United States of America, in the penal sum of five hundred dollars, lawful money, to be void upon this condition: Whereas, the above bounden William M'Knight, principal aforesaid, has been brought before me, George L. Nightengale, J.P. this 9th April, 1843, upon a charge of an assault with an intent to kill; and whereas, the examination of the said defendant has been postponed at his request untill to-morrow morning, April 10, 1843, in order to procure testimony in his behalf. Now if he, the said Wm. M'Knight, shall be and personally appear at the office of the above named justice at the hour of 10 A. M. and not depart without being legally discharged, then this obligation to be null and void, otherwise of force, Given under our hands and seals at Dubuque, this 9th April, A. D. 1843.

"WM. S. M'KNIGHT [L. S.]
"LAWRENCE MALONEY [L. S.]

"In presence of GEO. L. NIGHTENGALE, J. P."

addition to the note, a full s[illegible]ch the non-appearance was had between them. [illegible]e.

"Upon this state of the [illegible]ded *non est factum* with turned a verdict for the [illegible]ation, &c. the Court upon the ab[illegible] the case was tried and a ver- the plaintiff could n[illegible] for the plaintiff for the penalty against him, to w[illegible] prays the Court [illegible] defendant, Maloney, asked the [illegible] the jury that the statutes of this terri- Burkadink [illegible] the justice to take bonds for appear- HALL, [illegible] except in cases of assaults, batteries, CAR[illegible] which was refused, to which defendant ex- [illegible] brought to this Court upon a writ of error, P[illegible] this Court by Lawrence Maloney. in [illegible] signed: — (h[illegible] 1. The bond on which this action is brought is null and c[illegible] been taken by the justice of the peace below for favor to one of said defendants when in custody under a criminal prosecution, and against the policy of the law; and consequently the verdict was against law, and the judgment was erroneously entered against defendants.

2. The said bond was taken by a justice of the peace, conditioned for an appearance before him of a person charged with the attempt to commit murder, which proceeding was wholly illegal, as the justice ought to have either committed the accused, discharged him, or taken, not a bond, but a recognizance for his appearance to the next term of the District Court, to answer the offense.

CHURCHMAN, for plaintiffs in error.

CRAWFORD, for defendant in error.

PER CURIAM, MASON, CHIEF JUSTICE. — The validity of the bond on which this suit was brought is the only ques-

onsider. There is no express statute
ing of such a security for such a pur-
under the general law?

declares in broad terms, that "Any instru-
seal, fully and freely executed and delivered,
eemed valid and binding according to the fair
id meaning thereof, in all cases not otherwise de-
by express statute, unless the execution or delivery
such instrument shall have been obtained by fraud, or
or an unlawful purpose." Laws of 1838–9, page 76. This is nearly, if not entirely, coincident with the common law rule on the subject. At all events, it must be the rule of decision in this case.

The due execution and delivery of the bond is not disputed. It is not alleged to have been obtained by fraud, nor is there any express statute rendering it invalid. Was it obtained for an unlawful purpose?

It was given to secure the appearance of McKnight before the justice of the peace at the time therein specified, permitting him in the meanwhile to go at large. Arrested for an assault with an intent to kill, he *ob- *446
tained a postponement of the case until the following day in order to procure testimony, and was then released from custody, upon executing the bond on which this suit was brought. This purpose can only be considered unlawful upon the ground that the prisoner should have been retained in custody, and not permitted in this manner to go at large. Was it unlawful for the justice to grant him this indulgence? I think not.

The statute makes provision for the arrest of a person accused — for his examination — for his being admitted to bail, to appear at the next term of the District Court, in bailable cases, and for his commitment where bail is not allowed or cannot be procured. But it gives no directions as to the manner in which his attendance shall be secured pend-

ing the examination. It seems to contemplate that the examination will be gone through with at once, aud the prisoner committed, held to bail, or discharged immediately. Where, however, he is unprepared to undergo the examination on the day on which he is arrested, it is just and right that a reasonable time should be allowed him. In the meantime, how is he to be disposed of? Circumstances may render him unprepared for the investigation of his case for several days. Must the officer stand a sentinel over him all the time? There would not only be great trouble but great insecurity against escape in that method. Shall such escape be provided against by incarceration? This would seem unjust and oppressive, and contrary to the spirit of our law, where no offense has been proved, and where the offense charged is bailable by a justice of the peace.

Besides, the statute does not authorize in express terms a resort to either of these modes of securing the person of the accused in such a case, and if when held in durance in either of these methods, he should sue out a writ of *habeas corpus*, could it not be urged that his forcible detention was illegal, with quite as much propriety as the unlawfulness of the bond is now insisted on? It seems to me that the justice, in the present case, pursued the course dictated by humanity and justice, and that at least it is not opposed to the principles of law.

In the case cited from 4th Blackford, a bond was given by a justice of the peace to the governor for the benefit of any person aggrieved, conditioned for the faithful performance of duty, was held invalid because it was not authorized by law. I have some doubts whether such is a sound rule of the common law. See 7 Mass. Rep. 99, and the other cases cited by defendants in error. At all *447 events, it is not the rule laid down *by our statute, which, in a case like the present, renders the silence of the law as evidence of the validity of the bond.

Judgment affirmed.

Launcelot Jenkin *v.* James McCully.

Launcelot Jenkin *et al.* plaintiffs in error, *v.* James McCully, defendant in error.

Error to Henry.

Where there is a demurrer of one of several defendants in chancery for the want of equity, and going to the merits of the whole bill and undisposed of, a final decree cannot be entered up against the others who are in default for plea, answer, or demurrer (*h*).

Errors assigned: —

1. The Court erred in passing the decree and the giving the judgment thereon against one of the defendants in the Court below before they were all brought into Court by legal process.

2. In granting the decree while the demurrer of one was undetermined and undisposed of, and foreclosing the equity of redemption of the said defendant.

3. In granting the decree and giving the judgment upon the report of the master's estimate, which contradicts and falsifies the record.

4. In granting the decree against the defendant upon a usurious contract, &c.

The facts of the case are contained in the opinion of the Court.

J. B. Teas, for plaintiffs in error.

Hall, for defendant in error.

Per Curiam, Mason, Chief Justice. — McCully sold a tract of land to Jenkin, giving him a title bond and receiving a note for the purchase money. Jenkin sold the land and transferred the bond to Lyon, and Lyon transferred in the same manner to Rickey. McCully filed his

(*h*) To the same effect is the case of Pierson *v.* David *et al.* 4 Iowa, 410.

bill against the three defendants to enforce a vendor's lien. A rule was taken upon all the defendants to plead, answer, or demur by a particular day. Lyon demurred to *448 the whole bill for want of equity. *The other defendants failing to comply with this rule, default was taken against them. A final decree was entered in effect against all the defendants, and the land directed to be sold.

It is very questionable whether a decree could have been regularly entered up against the parties in default, while the demurrer of the other defendant, going to the whole merits of the bill, remained undisposed of. Such would certainly have been the case where one of the defendants had answered to the merits of the bill. 3 Eq. Dig. 243. The same reason would seem to apply to demurrers.

But, at all events, the decree was irregular and improper as against Lyon, who was not in default; and his demurrer, if sustained, will prove a complete defense to Jenkin and Rickey. The decree will, therefore, be set aside, and the case remanded to Henry county for further proceedings.

JOHN C. SHEPPARD *et al.* plaintiffs in error, *v.* JOHN WILSON, defendant in error.

Error to Scott.

Where a judgment was rendered *nunc pro tunc* on a motion for a new trial, which had been taken under advisement, bearing date at a time when the Court was not in session, it was properly regarded as a nullity; and the Court, when regularly in session subsequently, was authorized to enter up a judgment upon the verdict previously rendered, without regard to a writ of error which had been sued out upon the first illegal and void judgment.

John C. Sheppard *v.* John Wilson.

The only point considered in this case is contained in the opinion of the Court.

GRANT & MITCHELL, for plaintiff in error.

COOK & LEARNED, for defendant in error.

PER CURIAM, MASON, CHIEF JUSTICE.— The record in this case shows that, at the October term of 1841, a verdict was rendered against the plaintiffs in error for $1,837.50, and thereupon they filed a motion for a new trial. After argument on this motion, the Court took the same under advisement.

*Afterwards, under date of April 12th, 1842, the *449 following entry appears: "And now come the parties, by their attorneys, and the defendants move for judgment on the motion for a new trial, made and argued at the last term of this Court in this cause and held under advisement until the present term. It is considered by the Court that said defendants take nothing by their said motion. And thereupon the plaintiff moves the Court for judgment upon the verdict rendered by the jurors aforesaid at the last term of the Court in this cause. It is, therefore, considered by the Court that the plaintiff recover of the defendants," &c (completing the regular entry of judgment).

On this judgment a writ of error was sued out, dated September 26th, 1842. This writ of error was allowed for probable cause, but no bond was filed in pursuance of the statute, so far as appears by the record, nor is there anything to show when the writ of error was served — or whether it was ever served — except from the return of the clerk of the District Court of Scott county, dated December 28th, 1843, merely certifying up a transcript of the record.

Under the date of October 7th, 1842, the following entry is found on the record: "This day came the said

plaintiff, by his attorneys, and it appearing to the Court that at a previous term of this Court, to-wit: the October term, 1841, the issue previously joined in this cause was submitted to a jury, who, after hearing the evidence and arguments of counsel, returned into Court the following verdict, to-wit: They find the issue for the plaintiff and assess his damages at the sum of $1,837.50. Whereupon a motion was made by the attorney for the defendants for a new trial herein, which motion was at said October term taken under advisement by the Court. And it further appearing to the Court that this Court has not at any time since decided said motion, but that said motion was continued under advisement until the present term, that the order of continuance at last term was not entered of record, it is therefore ruled that said order of continuance be entered *nunc pro tunc*. And the Court now having fully considered the said motion for a new trial, doth overrule the same. And it is further considered by the Court that the plaintiff have and recover," &c (completing the entry of judgment in the usual form).

The record therefore shows a regular judgment, a writ of error taken thereon, and subsequently another regular judgment. But a reference to the statute and the almanac will show that the judgment of April 12th was not entered up during the time prescribed by law for the session of the Court in Scott county. The Court in that year com-
*450 menced in Scott *county on the 4th, and in Clinton county, in the same district, on the 11th of April. Of course this judgment was entered up in Scott county on the second day of the session in Clinton county.

The decision of this case depends upon the effect that is given to such a judgment. If it is a nullity it was certainly proper for the Court, when regularly in session, to disregard it altogether (as it appears to have been done), and to enter up a judgment then without reference to the former one, or to the writ of error that had been sued out

thereon. Such we consider is the proper light in which to regard it.

The 9th section of the organic act provides for holding District Courts "at such times and places as may be prescribed by law." It can only act in Scott county in the entering up of judgments, while it is by law authorized to be in session in that county, and it can only be in session in one place at a time in the same district. The first judgment, therefore, in Scott county was wholly unauthorized and nugatory. The second was consequently regular and should be affirmed, which is accordingly done.

FRANCIS M'DONALD *et. al.* plaintiffs in error, *v.* JOHN T. LIGHTFOOT, defendant in error.

Error to Lee.

In an action of trespass, the defendant may properly introduce evidence to prove that the plaintiff had originally taken possession of the house by disseizen and trespass on the defendant, and that he had a right to the possession of the house at the time of the force and arms complained of by plaintiff.

Such evidence would not be a defense to the action, but it should be admitted in mitigation of damages.

A record of a recovery in an action of forcible entry and detainer, for a portion of land, &c. is not admissible in bar to an action of trespass committed on another portion of it by the defendant.

This was an action of trespass *quare clausum fregit*, instituted by John T. Lightfoot against Francis M'Donald, Andrew Butler, John W. Patton, Nathaniel Markham, Orson Markham, and Andrew Mitchell, before a justice of the peace. Judgment was rendered against M'Donald, *Butler, and Patton, for twelve dollars and costs, *451 and the case was taken to the District Court, on appeal,

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where it was tried at May term, 1844, and a verdict and judgment had for plaintiff.

The following bills of exceptions were taken: —

"Be it known that on the trial of this cause the plaintiff gave in evidence and proved that he was in possession of a house situated in Lee county, and had been in the possession for three months, and that during the temporary absence of the plaintiff and his family the defendants entered into said house, and removed the household goods and chattels of the plaintiff out of said house, and took and retained possession of the house.

"The defendant then offered to prove that the plaintiff had originally taken possession of the house by disseizen and trespass on defendant, M'Donald, and that M'Donald had the right to the possession of said house at the time of the force and arms complained of by plaintiff. He peaceably entered into said house, and, doing as little harm as possible, gently removed the goods and chattels of the plaintiff out of said house, and that the plaintiff nor any of his family did not return to said house until after all the plaintiff's goods had been removed, and defendant, M'Donald, was in possession of said house.

"To which testimony so offered by defendants, the plaintiff, by his counsel, excepts, and prays the Court to sign and seal this their first bill of exceptions, which is accordingly done.

"CHARLES MASON, *Judge* [L. S.]"

"Be it known that on the trial of this cause, the plaintiff offered evidence to the jury going to prove that the plaintiff had been in possession of a certain house, and that during the absence of the plaintiff and his family, the defendant took possession of said house, and removed the plaintiff's goods. Said premises were on the southwest quarter of section 17, township 67 N. range 6 west.

"The defendants in their defense offered to prove, by way of justification and mitigation of damages, a record and judgment of the proceedings of a forcible entry and detainer suit had between the said defendant, M'Donald, as complainant, and said plaintiff was one of the defendants. Which suit had been tried before a justice of the peace, and appealed to the District Court of Lee county, and in which case M'Donald had recovered. And that said premises upon which this trespass was committed was the same in part as recovered in said suit of forcible entry *and detainer. To which record and evidence *452 the plaintiff, by his attorney, objected, and the Court sustained the objection, and ruled that said evidence should not be received. To which decision and ruling the defendant, by his attorney, excepts, and prays the Court to sign and seal this his second bill of exceptions, which is accordingly done.

"CHARLES MASON, *Judge* [L. S.]"

The defendants sued out their writ of error from this Court.

The refusal to admit the defendant's evidence in the two bills of exceptions mentioned, are the errors assigned.

HALL & MILLS, for plaintiffs in error.

WRIGHT & KNAPP, for defendant in error.

PER CURIAM, MASON, CHIEF JUSTICE.— We think the Court below erred in refusing to admit the evidence offered by the plaintiff in error, as set forth in the first bill of exceptions. Although we think the facts, if proved, would not have been a defense to the action, still they should have been permitted to be shown in mitigation of damages.

The evidence proffered, as stated in the second bill of exceptions, was correctly refused admission.

Judgment set aside and trial *de novo* ordered.

JAMES W. MARGRAVE, plaintiff in error, *v.* THE UNITED STATES, defendant in error.

Error to Linn.

Under the act of the legislature rendering private prosecutors liable for costs, there must be a trial and acquittal to render the prosecutor liable. And the Court must be satisfied that the prosecution was malicious (*i*).

At the April term of the District Court of Linn, James W. Margrave prosecuted William H. Woodbridge for forgery, and no indictment having been preferred, the Court rendered a judgment against Margrave for costs to the amount of $18.72.

*453 *To reverse this judgment, Margrave sued out his writ of error from this Court.

Errors assigned:—

1. It does not appear from the record that William H. Woodbridge, the defendant in the prosecution wherein said judgment was rendered against said plaintiff in error, was tried and acquitted, and it does not appear that said Woodbridge was *not tried* in the Court below.

2. It does not appear from said judgment, and the record thereof, that said prosecution was malicious, nor does it appear that the Court was satisfied that said prosecution was malicious.

3. There was no process in said cause to bring said plaintiff in error into the Court below, and said judgment was rendered against him without an opportunity to show cause, or be heard in any manner against the same.

4. There was no hearing in the Court below upon which the Court was authorized to determine that said prosecution was malicious.

(*i*) Rev. § 4646; State *v.* Donnell, 11 Iowa, 452.

5. The Court was not authorized to render said judgment upon the finding of the grand jury.

6. The grand jury was not authorized by the law to award the costs against the prosecutor.

JOHN DAVID, for plaintiff in error.

E. H. THOMAS, district prosecutor, for defendant in error.

PER CURIAM, MASON, CHIEF JUSTICE.— We think the Court below erred in rendering judgment for costs against the plaintiff in error. The act relative to criminal proceedings renders the private prosecutor liable only when the accused has been "acquitted on his trial." Laws of 1843, page 151, section 29. The only mode in which it is to be ascertained whether there has been a private prosecutor is by the endorsement upon the indictment, and where there is no indictment there can be no such endorsement.

Appended to the same act, which provides for rendering the private prosecutor liable, are some additional sections, one of which declares that "No costs shall be rendered by the Court in the event of the acquittal of a person charged with a criminal offense against the private prosecutor unless the Court is satisfied that the prosecution is malicious."

These two provisions when taken together do not authorize the grand jury nor the Court to impose a liability upon any person, on the ground of his being a private prosecutor, except in the precise manner therein *pointed out. An indictment must have been found *454 — the name of the private prosecutor thereon endorsed — the accused must have been acquitted on the trial and the Court must have been satisfied that the prosecution had been malicious. This last fact would have been inferred from the action of the Court in this case, but the other three did not exist and they are all material.

Judgment reversed.

Eleazur Huff *v.* Charles M. Jennings *et al.*

Appeal from Cedar.

On a bill for a specific performance, a tender of the purchase money must be made to the vendor, before the complainant can legally require the conveyance of the land purchased (*j*).

A party wishing to set aside a contract must show some useful purpose to be thereby accomplished.

This was a bill filed by Eleazur Huff, against Charles M. Jennings and others. The bill sets forth that the defendant, Jennings, in 1840, purchased from the board of commissioners of Cedar county lot No. 2, in block No. 11, in the town of Tipton, for the sum of about sixty dollars, of which he paid one-fourth in hand, and afterwards paid another fourth of the purchase money; that the board of commissioners executed and delivered to Jennings a title bond, conditioned to execute and deliver to said Jennings a warranty deed for said lot, when he should pay up the balance of the purchase money; that in pursuance of said purchase, and by the assent of the commissioners, the said Jennings took possession and erected a tavern, &c. And that afterwards, in November, 1841, the said Jennings made a loan of one hundred and twenty-five dollars from the complainant, and to secure the payment executed a mortgage to said complainant on the lot in question, and other property; that the money was not paid, and that at the April term, 1843, of the District Court of Cedar, the mortgage was foreclosed and a sale of the premises ordered; and that afterwards in July, 1843, Jennings, confederating with Rankin and M'Coy (made defendants with said com-

(*j*) See Collins *v.* Vandever, administrator, 1 Iowa, 573; Young *v.* Daniels, 2 Iowa, 126; Wright *v.* Le Claire, 3 Iowa, 221; Olive *v.* Dougherty, 3 Greene, 371; Clarke *v.* Langworthy, 3 Iowa, 563; Lewis *v.* Kerr & Craig, 17 Iowa, 72; Crawford *v.* Paine, 19 Iowa, 172.

missioners), went before the board of commissioners and relinquished his right and title to said lot, and thereupon Rankin and M'Coy, in pursuance of an arrangement made with said *Jennings, and having full notice *455 that Jennings had conveyed his right in the lot to the complainant by a mortgage, that the mortgage had been forfeited, and that a decree of foreclosure and order of sale had been made, paid to the said commissioners the balance of the purchase money, about thirty dollars, which would have been due from Jennings, and received a deed from the commissioners for the lot. The bill avers that the complainant had always been ready and willing, and was then ready and willing to pay the purchase money whenever the board of commissioners would make a deed to Jennings or the complainant, the mortgagee. The bill further prays that Rankin and M'Coy may be decreed to deliver up said deed, to be cancelled, and the commissioners may be decreed to make a deed to Huff, or Jennings, upon payment of the purchase money due.

The defendants, on motion, obtained an order dismissing the bill for the want of equity, and the complainant appealed to this Court.

JOHN P. COOK, for complainant.

CARLETON & LOWE, for defendants.

PER CURIAM, MASON, CHIEF JUSTICE.—That a tender should have been made before a conveyance could have been legally required, admits of no question. But it is contended that the sale to Rankin and M'Coy, being fraudulent, should be set aside without any such tender.

We think otherwise. Unless the remainder of the purchase money is paid, neither Jennings nor those claiming under him, have any right to the land; their only remedy being a recovery back of the amount already paid. The

time for the payment of the balance having already expired, the purchaser was in default. The subsequent sale by the commissioners was valid, as against all persons having no interest in the matter. The law does not permit intermeddling in such cases.

If the second sale should be set aside, what certainty is there that the first will ever be consummated. The law will not do a nugatory or wanton act. The party wishing to set aside a contract must show some useful purpose to be thereby accomplished. The complainant in this case should therefore, in order to set aside the second sale, have shown a readiness to consummate the first, without which any disturbance of the first would be an act of sheer wantonness. The decree of the Court below, dismissing the bill for want of equity, will, therefore, be affirmed.

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*456 *HEZEKIAH MUSGRAVE, plaintiff in error, *v.* JOHN W. BRADY *et al.* defendants in error.

Error to Muscatine.

A case must be tried upon the record alone. The Supreme Court will not regard affidavits made for the purpose of changing or explaining the record; nor an independent certificate of the clerk stating facts not apparent in the record.

He who would avail himself of the violent remedy of attachment must keep close to the statute (*k*).

Where an attachment bond and the declaration set out the plaintiff's name as *Henry* and the writ of attachment run in the name of *Hezekiah* Musgrave, it was properly quashed.

This was an action of assumpsit brought by the plaintiff

(*k*) By Revision of 1860 the attachment law is to be *liberally* construed, § 3242.

against the defendants in error accompanied by a writ of attachment. The attachment bond and the declaration were in the name of Henry Musgrave, and the suit was commenced and the summons issued in the true name of the plaintiff.

The defendants moved to quash the attachment for the following reasons:—

1. The causes for the attachment set out in the affidavit were in the alternative.

2. The sheriff did not attach the property in presence of two citizens of the territory possessing the qualification of jurors.

3. The sheriff did not make an inventory and appraisement according to law.

4. Because all the proceedings in the attachment were irregular and illegal.

5. Because there had been no declaration filed within ten days after the writ of attachment was issued.

The plaintiff had leave to amend his declaration.

The defendants craved oyer of the writ and filed a plea in abatement of the writ and declaration, because the writ commanded them to answer unto Hezekiah Musgrave, and that the declaration was throughout in the name of Henry Musgrave.

The plaintiff filed an affidavit of his meritorious cause of action, and that the amount which appeared upon the papers was due in good faith, and that the attachment was commenced simultaneous with the *summons, *457 and that he believed the defendants were on the verge of insolvency, &c.

An affidavit of the plaintiff's counsel was also filed that he knew the plaintiff equally well by the name of "H. Musgrave" and "Henry Musgrave," and that he generally had seen his name written "H. Musgrave." That he drew up all the papers in the name of Henry Musgrave, and that all the papers wherein the name of Musgrave oc-

curred, by whatsoever Christian name, were intended for the same suit, &c. &c.

The attachment was dismissed, and the Court adjudged that no declaration had been filed within ten days from the time of issuing the attachment.

The case was submitted to a jury at December term, 1842, and a verdict and judgment had for the plaintiff for the sum of $355.90 and costs.

The said Hezekiah Musgrave sued out a writ of error to reverse the ruling of the Court below, and has assigned for error: —

1. The Court decided that there was no declaration filed in this case within ten days next after issuing the writ of attachment, and that for this reason the attachment should be quashed; when, in truth, a declaration in the case had been filed within ten days next after the issuing the writ of attachment. Therefore, in this there is error.

Whicher, for plaintiff in error, suggested a diminution of the record as to the amendment of the declaration, which diminution was confessed by Hastings, for defendants.

A *certiorari* was issued to the clerk of the Court below, to send up a more complete record; and instead of a complete and entire record being sent up, the clerk certified under the seal of the Court as to the amendments, &c.

Per Curiam, Mason, Chief Justice. — This case must be tried upon the record, and upon that alone. We cannot, therefore, pay any regard to the affidavits made for the purpose of changing or explaining the record as set forth in the transcript. Nor can the certificate of the clerk be of any avail. When he sends up a transcript of the record, his certificate to the same is sufficient evidence to serve as a basis for the action of this Court. But an independent certificate of his is of no higher authority than

that of any other individual. If there had been an error in the transcript in the first instance, measures should have been taken to procure an amended copy thereof, but evidence in the form of a certificate given by the clerk stating facts not apparent upon *the record, or even *458 stating what the record should have been, without giving a true copy thereof, cannot be considered and acted upon by this Court.

In the present case the suit is commenced and the summons issued in the name of Hezekiah Musgrave. The attachment bond and the declaration are in the name of Henry Musgrave. The statute requires a declaration, in cases like this, to be filed ten days before the return day of the writ. The Court below decided that a declaration in the name of Henry Musgrave in this case was not a compliance with the above requirement of the statute, and, therefore, quashed the writ of attachment. But inasmuch as this writ, by our statute, is a mere auxiliary process, the plaintiff was permitted to amend his declarration and proceed in the same way as though no writ of attachment had been issued.

We think this ruling of the Court was correct. He who would avail himself of the violent remedy of an attachment must keep close to the statute. The writ issued in the name of Hezekiah Musgrave, and ten days before the return day thereof, a declaration should have been filed in the same name. The quashing of the writ of attachment being the only error complained of in this case, the judgment of the Court below will be affirmed.

William Long, plaintiff in error, *v.* Gabriel Long (for use of Walling), defendant in error.

Error to Muscatine.

Where a defendant in the Court below neglects for several terms to move to have a case which has been remanded for a new trial docketed and disposed of, he will not be permitted to have it stricken from the docket at the first term the plaintiff has placed it there.

All the facts necessary to an understanding of this case are contained in the opinion of the Court.

Whicher, for plaintiff in error.

Woodward, for defendant in error.

*459 *Per Curiam, Mason, Chief Justice.—From the bill of exceptions it appears that this case, having been tried in the District Court of Muscatine county, at its June term, A. D. 1839, it was taken to the Supreme Court, and reversed at the July term of the following year. A new trial was ordered, and the writ of *procedendo* filed in the office of the clerk of the Court below on the 13th of September, 1841. The original note and declaration being attached together, have not been on file since the decision of the Supreme Court, and seem not to have been within the reach of the plaintiff below.

At the October term, 1843, the case was docketed in the Court below for the first time since it had been sent down from the Supreme Court. Thereupon the counsel for the defendant moved to strike the case from the docket, for the alleged reason that the same had, in effect, been discontinued. This motion being overruled, the case was brought here to test the correctness of that decision.

The defendant certainly should be permitted to bring litigation to an end, and not be compelled to remain in Court, term after term, to suit the pleasure of the plaintiff. Nor does the practice of our Courts permit such oppression. He might at any time after the case was remanded have moved to have it docketed (after a reasonable time) disposed of. Without taking this course he remained passive until several terms had elapsed, and as soon as the case was docketed, moved at once for an order of discontinuance. We think the motion was premature.

In England and New York the same power is not given to the defendant as to the plaintiff in urging a case to trial. The plaintiff has the privilege, when a case is called in its order, of saying whether it shall or shall not be then tried. But to prevent too great abuses arising from this source the defendant is permitted, after a lapse of a reasonable time, if no trial is had, to move for a judgment as in case of non-suit; a motion substantially the same as that made and overruled in the Court below. The reasons for establishing such a rule there do not, therefore, apply here, where each party has an equal right to urge on a case to trial, and ought, therefore, to be regarded as equally responsible for delay.

The decision of the Court below will, therefore, be affirmed.

*460 *JEREMIAH YOUNG and DENTON J. SNYDER, plaintiffs in error, *v.* THOMAS M. ISETT, defendant in error.

Error to Muscatine.

Where A sold to B a lot of land for $675.00, and three hundred dollars were paid down and notes given for the remainder by B; and the vendor, executing a bond to convey upon the payment of the last note, and before the note fell due B sold the lots and assigned the title bond to C, who knew of A's lien for the balance of the purchase money: Upon a bill filed by A against B and C, held that his lien against C should be enforced (*l*).

This was a bill in chancery filed by Isett against Young & Snyder. The bill stated that on the 19th of March, 1840, the complainant owned the north half of lot No. 2, in block No. 10, in the town of Bloomington, and that he sold one-half of it to Young for $675; he paying three hundred down and giving two notes for the balance, the last due and payable 1st April, 1841; and that complainant executed a title bond to convey said half lot at that time, and gave Young possession; that before either of the notes became due Young left the territory, and had not returned; that previous to his departure he sold the title bond to Snyder, who purchased with full knowledge that the notes were unpaid; that Snyder was then in possession of the lot and bond; that complainant had repeatedly requested Snyder to pay the money, take a deed, and cancel the bond and notes, which he refused to do; that complainant had followed Young to foreign parts, and had made the same offer to him, which he also refused; that he could not collect the notes of Young by reason of his absence and insolvency. Concluding with a prayer that

(*l*) See Grapengather *v.* Fejervary, 9 Iowa, 163, sustaining the principle in this case.

the contract be cancelled, or that the lot be sold and the proceeds applied to the extinguishment of the debt, &c.

To this bill there was a general demurrer for want of equity.

The cause was finally heard at June term, 1843, and a decree that the defendant's equitable interest in said half lot should be sold for the benefit of Isett, and that upon the payment of the amount due him, he should make a deed to the purchaser, &c.

HASTINGS, for plaintiffs in error.

WHICHER, for defendant in error.

*PER CURIAM, MASON, CHIEF JUSTICE.—This was a *461 bill brought by Isett, to subject certain real estate to a vendor's lien. The bill sets forth that the complainant being the owner of a half lot of ground in the town of Bloomington, on the 14th day of March, 1840, sold the same to the defendant, Young, for the sum of six hundred and seventy-five dollars; three hundred of which was paid down, and two notes given for the remainder. The complainant at the same time executed a title bond, conditioned to execute a deed upon the payment of the remainder of the purchase money. Before the notes became due, the defendant, Young, removed from the territory; selling at the same time the half lot aforesaid, and assigning said bond to the defendant Snyder, who purchased with a full knowledge of the facts above mentioned. The bill then alleges that Young is of doubtful solvency, so that to follow and prosecute him abroad would be without avail. Upon this state of alleged facts, he asks the enforcement of his lien against the present possessor of the premises.

To this bill the defendants demurred, which demurrer was overruled and a decree entered pursuant to the prayer of the bill. We are now to enquire whether the Court below erred in thus overruling the demurrer. The decision

of this question depends entirely upon that of the right of the complainant to enforce a vendor's lien under the circumstances set forth in the bill.

Snyder being a purchaser with notice of the complainant's equity, is in no better situation than his co-defendant would have been had he remained still in the ownership and possession of the property. The only possible doubt in this case is as to the vendor's lien applying to equitable titles, like that held by the defendants. The decisions in Blackford are directly in point, and we shall adopt the rule there laid down. See 1 Blackford, 246 and 416.

Decree affirmed.

Alexander A. Wilson *v.* Joseph Hughell.

Appeal from Jefferson.

An injunction will not lie to prevent the commission of a simple act of trespass, the party injured having an adequate remedy at law (*m*).

*462 *This was a bill filed by Wilson against Hughell, praying a writ of injunction to restrain the defendant from committing trespasses upon the complainant's land claim.

The cause was finally disposed of in the Court below, at September term, 1842. The bill was dismissed and a decree that the respondent should have and recover from the complainant his costs. The complainant appealed to this Court.

Shuffleton & Gray, for complainant.

(*m*) By the Revision of 1860, a plaintiff may have an injunction to prevent the *repetition* of a trespass, when he has brought his action for the injury already committed. §§ 3798, 3799, 3800; Hall *v.* Crouse *et al.* 14 Iowa, 487.

HALL & HUMPHREYS, for defendant.

PER CURIAM, MASON, CHIEF JUSTICE. — The complainant in this case sets forth in his bill that in June, 1839, he purchased a "claim" lying in the county of Jefferson; that the defendant claimed a portion of the timbered part thereof; that an arbitration was had, and the tract in dispute awarded to the complainant; that the defendant still continuing to cut timber, an action of trespass was brought, which was taken by appeal to the District Court, and that the said defendant still continues to trespass. An injunction is therefore prayed for, which was granted.

At a subsequent term of the District Court for Jefferson county, a demurrer was filed to this bill, and sustained by the Court. The complainant then obtained permission to amend his bill.

The bill, as amended, alleges that the complainant has a right of pre-emption to the quarter section of land, including the tract in controversy, but that he is unable to perfect his title by reason of the public surveys being not yet completed.

To the bill thus amended the defendant answered, denying that the complainant had such right of pre-emption to the land on which the trespasses were alleged to have been committed.

The allegation in relation to the right of pre-emption is not sustained by the proof, and seems to have been abandoned, as it has not even been alluded to in the argument; so that the only question remaining for investigation is whether an injunction should be granted to restrain the commission of trespasses upon claims on the public lands, under circumstances like those set forth in the bill of complainant in this case. To make the case the strongest for the complainant, is he entitled to relief if his original bill is wholly true? In other words did the Court below err in sustaining the demurrer to that bill?

Without stopping to enquire whether, under any circumstances, the mere occupier of a "claim" on the public
*463 lands is entitled to an injunction *to prevent acts of trespass, it is very evident that he would have no stronger claim to such a remedy than the owner of the freehold would have under like circumstances.

It is a well settled rule that an injunction ought not to be granted to prevent the commission of a simple act of trespass; the party injured in such cases having an adequate remedy at law. To take a case out of this rule, peculiar circumstances must exist. The bill in the present case shows nothing of this kind, and even if it were competent for the complainant to make out a good case by his proof when one is not set forth in his bill, that has not been done in the present case.

The bill was, therefore, properly dismissed, and the decree is affirmed.

James A. Cunningham *v.* Wesley Depew, William Thorn, and Joel Arrington.

Appeal from Jefferson.

Where A, the complainant, purchased of defendant B a land "claim" for which he was to pay $600, and did pay nearly $500 down, and gave his note for the balance, and A being absent when the land was brought into market, B borrowed the money of C with which to enter the same, and afterwards sold the same to D, an innocent purchaser, without notice; held that that the title of D could not be disturbed on a bill filed by A for a specific performance, but that A was entitled to a decree against B for the whole amount of the purchase money under the prayer for general relief.

This was a bill filed by the complainant against the defendants in the District Court of Jefferson county, in

August, 1843, and at September term, 1844, the following decree was made, Judge Mason presiding: —

"This cause came on to be heard upon the bill, answer, exhibts, and evidence, and was argued by counsel, and the Court, after due consideration, ordered, adjudged, and decreed that the said complainant's bill, as to said respondents, William Thorn and Joel Arrington, be dismissed at complainant's costs, and it was further ordered, ajudged, and decreed, that said complainant has a good equity against the said respondent, Wesley Depew, for the amount of money which he had received from said complainant, which amount was ascertained by the Court to be the sum of six hundred dollars, with six per cent interest thereon since *the 17th day of August, 1842, *464 amounting to the sum of seventy-three dollars and forty cents, making in all the sum of $673.40, which said sum is to be credited with the sum of twenty-five dollars for the services of said Depew, leaving a balance of six hundred and forty-eight dollars and forty cents. It is thereupon ordered, adjudged, and decreed by the Court, that said Wesley Depew do pay to said complainant, within ten days from the adjournment of this Court the said sum of six hundred and forty-eight dollars and forty cents, with accruing interest and costs of this suit, and in default thereof, that a special execution issue to the sheriff of Jefferson county, or into any other county in this territory, that said complainant may direct, thereby commanding said sheriff to cause to be levied of the goods and chattels, lands and tenements of said Depew, the said sum of six hundred and forty-eight dollars and forty cents, with interest and costs of this petition, and accruing costs, and that said writ be executed and returned, the same as executions at law. It is further ordered that a certain note given by said complainant to said Depew, for about one hundred and eight dollars, be credited upon said demand, whenever said Depew shall bring the same and file it with the clerk of this Court,

and that six per cent interest be allowed on said note from date, being 17th of August, 1842."

The defendant, Depew, appealed to this Court.

All the other essential facts of the case are recited in the opinion of the Court.

SHUFFLETON, GRAY & NEGUS, for appellant.

HALL, for appellee.

PER CURIAM, MASON, CHIEF JUSTICE.— The main facts in this case are not controverted. The complainant, in August, 1842, then a resident of the state of Ohio, purchased of the defendant, Depew, what is commonly known as a "claim," embracing a quarter section of land, lying in the county of Jefferson in this territory, for which he was to pay the sum of six hundred dollars. Nearly five hundred dollars of this amount was paid down, and to secure the remainder a promissory note was given for the sum of one hundred and nine dollars, payable April 1st, 1843. In February, 1843, the land was brought into market. Cunningham was absent, and Depew borrowed money of one Arrington, with which he entered the land, and afterwards sold the same to the defendant, Thorn. The most material point in dispute is whether Depew, in borrowing the money of Arrington, and entering the *465 land, acted as the agent of *Cunningham. This matter, however, seems to be placed beyond controversy by the letter of Depew, dated February 11th, 1843, which is appended to the bill as an exhibit. He there states: "I received a few lines from you stating that you wished me to buy your land. I obtained a loan of money sufficient to enter you claims, which was two hundred dollars at twenty per cent, for two years, but you have the right to redeem it in the spring if you wish," &c. &c.

The sale seems to have been made to Thorn without any knowledge on his part of Depew's want of power to make

him a good title. He doubtless, therefore, acted in good faith, and his title cannot be disturbed. The conveyance, therefore, asked for in the bill was properly refused, but it requires neither authority nor argument to show that Cunningham is entitled to relief against Depew. The latter sold complainant a claim to a quarter section of land for which he received six hundred dollars in cash and negotiable paper. When the land was about to come into market he, as agent for complainant, borrowed the money necessary to pay for it with the evident understanding that it was to be repaid by his principal. Afterwards, without authority from his principal, he sold the land to a *bona fide* purchaser, without notice. The rights of Cunningham, then, were either to affirm the sale to Thorn, and claim the benefit of the proceeds thereof, or to disaffirm the act of the agent and claim from him the value of the land which he had thus placed beyond the reach of his principal. That value had been previously fixed by the parties themselves at six hundred dollars, and the decree of the Court for that amount was therefore just and proper. Had the defendant delivered up the note to be cancelled on the trial, a deduction for that amount would have been proper. But as he holds on upon that instrument, and for ought appearing to the contrary has transferred it, it was proper to render a decree for the whole amount.

Nor do we feel certain that the result would have been different had the truth of the defendant's answer been fully admitted. He would certainly in that case have been under no obligation to have taken any steps to secure the land at the public sale, but a Court of equity would have been very reluctant to see him avail himself of the misfortunes of the complainant so far as to secure the land to himself, and pocket the value thereof besides. If Cunningham had been unable to fulfill his contract, it might, under proper circumstances have been rescinded, but we see nothing therein by which we can conclude that a failure on his

part to perform his whole contract, should work a forfeiture of the amount paid. As a general rule, a contract can only be rescinded by *placing the other party *in statu quo*; by a restoration of the amount already paid on the contract. If the defendant had felt unwilling to rescind upon such terms, he should have brought suit upon the broken contract instead of treating it as null and void. But this he has not done He has treated the contract as rescinded. He has the land in the same way as though it had not been sold by him, so that he has sustained no injury on that score. At the same time he has the six hundred dollars in note and money, which he is equitably bound to restore.

*466

We are, therefore, fully of the opinion that the decree below should be affirmed.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF IOWA.

JANUARY TERM, 1846.

HON. CHARLES MASON, CHIEF JUSTICE.
" JOSEPH WILLIAMS, } ASSOCIATE JUDGES.
" THOMAS S. WILSON, }

JOSEPH WEBSTER, plaintiff in error, *v.* HUGH T. REID, defendant in error.

Error to Lee.

The treaty of 1824, with the Sac and Fox tribes of Indians, by which certain lands were ceded to the United States, did not include that portion of their lands lying between the rivers Des Moines and Mississippi, which was reserved for the half-breeds belonging to said tribes.

By this treaty of 1824, the half-breeds had conferred upon them the right of private property in the lands reserved for their use, and not the sovereignty over them.

The title of the half-breeds was not disturbed by the second treaty and cession in 1832, as the cession of lands from one nation to another does not effect the right of private property.

Joseph Webster *v.* Hugh T. Reid.

The act of Congress of June 1834, conferred upon the half-breeds of the Sac and Fox tribes, a full fee simple title as tenants in common, to the reserved lands lying in Lee county, Iowa.

Although a legislature has not the power to destroy vested rights, it can create or augment them.

*468 *If a legislature sees proper to violate the solemn stipulations of a treaty, there is no power in the judicary to prevent it.

If a treaty is by the constitution declared to be the supreme law of the land, so is an act of Congress. The latter may repeal the former in the same manner that one statute may repeal another.

After the act of Congress of 1834, the half-breed tract was to the fullest extend individual property, and as such, by the organic act, placed under the municipal regulations of the territory of Iowa.

The act of 1834, conferring on the half-breeds a title, is a public statute, and should be judicially noticed.

A party to a judgment cannot collaterally impeach it for fraud, much less can a stranger be permitted thus to do it.

As a general rule, a judgment at law is an act so far conclusive as not to be disturbed by another judgment at law.

A contract however fraudulent, is not a nullity; it is valid as to all the parties to the fraud, and to all others, except those who are injured thereby.

Judgments rendered under an unconstitutional law are not nullities; and a sheriff levying and selling under such a judgment would not be a trespasser.

This was an action of right, instituted by Reid, against Webster, in the District Court of Lee, to recover the possession of the north-east quarter, of section number twelve, in township number sixty-seven north, of range number five west, containing one hundred and sixty acres, and which is a part of the land known as the half-breed tract in said county, containing one hundred and nineteen thousand acres.

As the decision in this case involves the title to all the lands lying in the half-breed reservation, we shall give a somewhat detailed history of the title of Hugh T. Reid, the plaintiff below, and the defendant in error.

HISTORY OF THE TITLE OF REID.—On the 4th of August, 1824, a treaty was concluded between the United States

and the Sac and Fox tribes of Indians, by which the latter ceded to the United States all their lands within the limits of the State of Missouri, and which treaty contained *the following reservation :* —

"It being understood that the small tract of land lying between the rivers Des Moines and the Mississippi, and the section of the above line between the Mississippi and Des Moines" (meaning *that section* of a line running from the north-west corner of the state of Missouri, east to the Mississippi, which would run from the river Des Moines to the Mississippi, and which section with said rivers bounds a triangular piece of land containing one hundred and nineteen thousand acres), "is intended for the use of the half-breeds belonging to the Sac and Fox nations; they holding it, however, by the same title and in the same manner that other Indian titles are held."

*On the 30th of June, 1834, an act of Congress was *469 approved, relinquishing to and vesting in the half-breeds of the Sac and Fox tribes of Indians, who, at the passage of this act, were, under the reservation in the aforesaid treaty, entitled by the Indian title to the same, all the right, title and interest which might revert or accrue to the United States in the land included in said reservation; with power to said half-breeds to transfer their portions thereof by sale, devise, or descent, according to the laws of the state of Missouri. Neither the treaty nor the act of Congress *named* the persons who were to take title under the law.

On the 16th January, 1838, the territorial legislature, with a view to ascertain who were the real owners of this tract, and to bring about a partition of the lands among the real owners, passed an act providing, among other things, for the appointment of three commissioners, who should hold their sessions at the town of Montrose, receive and record the evidence of all claimants, under the act of Congress aforesaid, of any interest in said lands; and

who were required to report to the District Court for Lee county the result of their investigations and the evidence received by them. This act also provided that said commissioners should receive $6.00 per day each, for their services, and which, with all other expenses of the commissioners, was to be paid by a sale of such portions of said tract as might be necessary to pay the same, said sales to be made on the order of the District Court, or a judge, in vacation.

Under this law, two of the commissioners actually served for near a year, and until January 25th, 1839, at which time the territorial legislature repealed the act of January 16th, 1838. No sales of land had been made at that time to defray the expenses of said commission. To meet this contingency the act of January 25, 1839, enacted as follows: —

"SEC. 2. That the several commissioners appointed by and under that act, to sit and take testimony, may immediately, or as soon as convenient, commence actions before the District Court of Lee county, for their several accounts, against the owners of the said half-breed lands, and give eight weeks' notice in the 'Iowa Territorial Gazette,' to said owners of such suits, and the judge of said District Court, upon the trial of said suits before it, at its next term shall, if said accounts are deemed correct, order judgment for the amount and costs to be entered up against said owners; and said judgment shall be a lien on said lands and a right of redemption thereto. Said judgment, when entered, shall draw interest at the rate of twelve per cent per annum.

"SEC. 3. The words 'owners of the half-breed *470 lands lying in Lee *county,' shall be a sufficient designation and specification of the defendants in said suits.

"SEC. 4. All the expenses necessarily incurred in the

discharge of their duties under the above named act shall be included in their accounts.

"SEC. 5. The trial of said suit or suits shall be before the Court, and not a jury, and this act shall receive a liberal construction," &c.

Under this law, two of the commissioners, Edward Johnston and David Brigham, each recovered judgments in the District Court of Lee county, Iowa, *v.* "The owners of the half-breed lands lying in Lee county," the former for $1,290.00; the latter for $818.00.

The jurisdiction of said District Courts and Supreme Court of Iowa is thus defined in the act of Congress creating the territory (sec. 9.): "And the said Supreme and District Courts shall possess a chancery as well as a common law jurisdiction."

On the 26th November, 1841, executions were issued *v.* "The owners of the half-breed lands lying in Lee county," on both of said judgments, one of which executions was levied as follows: "December 1st, 1842, levied the within execution on the half-breed Sac and Fox reservation in Lee county, Iowa territory, commonly called the half-breed tract; advertised the same for sale, for January 1st, 1842. January 1st, 1842, sold the above described tract of land; bought by H. T. Reid for the sum of $2,884.66, $1,762.66 to be endorsed in full satisfaction of the within execution.

"(Signed) HAWKINS TAYLOR,
"Sheriff of Lee county."

The other was levied as follows: "Levied the within execution on the half-breed tract of land situate between the Mississippi and Des Moines rivers, granted by treaty to the half-breeds of the Sac and Fox tribes of Indians; advertised same for sale January 1st, 1842. January 1st, 1842, sold the above described tract of land; bought by Hugh T. Reid for sum of $2,884.66; $1,122.00 to be endorsed on this execution.

"(Signed) HAWKINS TAYLOR,
"Sheriff of Lee county."

On the 2d January, 1843, William Stotts, then sheriff of Lee county, executed to Hugh T. Reid a deed in pursuance of the sales aforesaid, for the half-breed tract, containing 119,000 acres, and describing the same by its metes and bounds, which deed was duly acknowledged and recorded.

*471 *The case was tried at the May term, 1845, of the District Court of Lee county, before Judge Mason, and a jury.

Reid, plaintiff, offered in evidence the aforesaid judgments of Johnston and Brigham, when defendant objected to their being received, on the ground of want of jurisdiction in the Court to render them; which objection was overruled, and defendant filed his exception.

The plaintiff then offered in evidence the executions and levies and the deed of the sheriff, Stotts, referred to above; to the introduction of all which defendant objected. Objection overruled and exception filed. The plaintiff then proved the possession of defendant at the time of service of the summons in this suit, and then gave in evidence a plat of survey of the half-breed reservation, duly certified from the general land office, and proved by a surveyor, who had traced the lines of this reservation, that the land in controversy was within and a part of the reservation. The plaintiff also introduced as evidence the laws of the territorial legislature above referred to; to-wit: That approved January 16, 1838; the act supplementary thereto, approved January 22d, 1838, and the act repealing those last named, approved January 25, 1839, which was all the evidence given by the plaintiff.

Defendant then moved for a non-suit, and mainly insisted, —

1. That the plaintiff had failed to show title in the defendants to the judgment of Johnston and Brigham, inasmuch as the act of Congress approved June 30th, 1834, which ceded the lands to the half-breeds, was a *private act*,

and not having been given in evidence, the Court could not take notice of it.

2. That the Indian title to the land had never been extinguished, and, therefore, it was not subject to sale on execution.

3. That the plaintiff had failed to prove that any one of the "owners" was a resident of Iowa territory during the pendancy of the suits of Johnston and Brigham; and the judgments not having been rendered against any person by name, they were, therefore, mere nullities, and if not nullities, could not authorize an execution *v.* the half-breed tract in satisfaction.

4. That the laws of the territorial legislature referred to were unconstitutional and void, and, therefore, the judgments rendered in pursuance of them were void.

5. That the jurisdiction of the Court, in respect of the suits of Johnston and Brigham, was special and limited, and, therefore, the plaintiff should have proven the regularity of all the steps in the suits antecedent to the judgments.

*Which motion for a non-suit the Court overruled, *472 and defendant excepted thereto.

Defendant, Webster, then offered to prove that the judgments, executions, sheriff's deeds, and sheriff's sale, offered in evidence by plaintiff, were all procured by fraud of said plaintiff and others, and that the whole title of plaintiff was based upon fraud and fiction.

Which proof the Court refused to receive, and defendant excepted thereto.

The defendant, for the purpose of showing title in himself to the land in controversy, having given proof by hearsay from sundry persons that one Na-ma-tau-pus was a half-breed of the Sac and Fox nations; also, that certain Indians had so stated, and had made oath to the fact; also, that certain persons deceased, who had married half-breeds (not proven to be related to Na-ma-tau-pus by

either blood or marriage), but who were intimate with the Indians and talked their language, had stated while living that Na-ma-tau-pus was a half-breed; also, that his complexion indicated such an origin; then offered in evidence a deed from Na-ma-tau-pus to one John Bond, and from said Bond to one Theophilus Bullard, both duly executed and acknowledged, and conveying to said Bullard all the interest of said Na-ma tau-pus as a half-breed in the reservation above referred to, and also a deed from said Bullard and wife to the defendant, Webster, for all of said interest, also duly executed and acknowledged.

To the introduction of which deeds in evidence the plaintiff objected. The Court sustained the objection, and ruled that they should not be received; to which opinion defendant excepted.

Defendant then proved that he came into possession of the land in controversy in 1838, under the title derived from said Na-ma-tau-pus; that, at the time he purchased, there were improvements on said tract, and that he took possession, and has been in possession ever since.

Defendant then offered to prove, by parol testimony, that no service had ever been made upon any person in the suits of Johnston and Brigham; that no notice was given, by publication, of the pendancy of said suits; that the plaintiff, Reid, was one of the counsel who procured said judgments; that said judgments were rendered upon fictitious demands, and were never proven before the auditors; that Webster and some of the other owners of the half-breed tract of land were prevented from appearing and defending said suits of Johnston and Brigham by the fraudulent representation of plaintiff; that the sales
*473 were, in fact, never *made by Sheriff Taylor, and that the whole returns of Sheriff Taylor on the executions were false and fraudulent.

The counsel for plaintiff objected to the introduction of any such evidence; which objection the Court sustained,

and ruled that such evidence was inadmissible. To which opinion and decision defendant excepted.

No further evidenceof importance to the question raised in the Supreme Court was offered by either party, and here both rested and submitted the case to the jury after argument.

Whereupon the counsel for defendant asked the Court to instructed the jury as follows:—

1. That unless it was proved to the satisfaction of the jury that there was some person or persons within the territory of Iowa, at the time of the issuing of the process, or who appeared at the trial, or at some stage of the proceedings, that were within the jurisdiction of the District Court of Lee county, during the pendency of the suits of Johnston and Brigham, upon which this title accured, that owned or had an interest in those lands, they must find for the defendant.

2. That unless they find from the evidence that there were owners and persons or corporations, other than the government, who were owners or had an interest in said lands at the commencement of these suits by Johnston and Brigham, that they must find for the defendant.

3. That unless the jury find that some one or more of the owners of the half-breed tract of land were citizens of the territory of Iowa, at the time of the passage of the act of the Iowa legislature, approved January 25, 1839, or between that time and the execution of the deed by sheriff to the plaintiff, that they must find for the defendant.

4. That unless it has been proved to the jury that the defendants, sued by Johnston and Brigham, and upon whose judgments the plaintiff claims his title, were a corporation by virtue of law, and acting as such are liable as such, or a partnership firm by that name, or some kind of an association who had assumed the name of owners of the half-breed lands in Lee County, that the plaintiff cannot recover.

5. That if it is not proven to the jury that the judgments of Johnston and Brigham were rendered against some person or persons, body corporate or association of individuals, whose existence has been proved to exist at the commencement of the suits or at the rendition of the judgments, that they must find for the defendant.

6. That a judgment against a dead person, or a per-
*474 son who has no *existence whatever, is no judgment at all in contemplation of law, and a sale under such a judgment is void.

Which several instructions so prayed for to be given to the jury, the Court refused to give, and the defendant excepted thereto.

Verdict and judgment for plaintiff, Reid.

The defendant, Webster, removed the cause by writ of error to this Court.

Errors assigned:—

1. The Court below erred in admitting as evidence the judgment, execution, levy, and return of the sheriff in the case of "Edward Johnson *v.* Owners of the half-breed land in Lee county," as stated in the bills of exceptions, No. 1 and 7.

2. The Court below erred in admitting as evidence to the jury the judgment, execution, levy, and return of the sheriff in the case of "David Brigham *v.* The owners, of the half-breed land lying in Lee county," as stated in the bills of exceptions, No. 1 and 7.

3. The Court erred in admitting as evidence to the jury, the deed executed by William Stotts, sheriff, as set forth in the bill of exceptions, No. 7.

4. The Court erred in overruling the motion of defendant below for a non-suit, as set forth in bill of exceptions, No. 2.

5. The Court erred in refusing to admit the defendant below to introduce evidence to prove that the judgments, executions, sheriff's sale, and sheriff's deed, containing the

evidence introduced by plaintiff below, was procured by frand and fiction, as set forth in bill of exception No. 3.

6. The Court erred in refusing to admit the deed from Na-ma-tau-pus to John Bond, also, the deed from John Bond to Theophilus Bullard, and from Theophilus Bullard and wife to defendant below, as set forth in bill of exceptions No. 4.

7. The Court erred in excluding from the jury evidence to prove that no service had ever been made upon any person in the suits in which judgments were rendered in favor of Johnston and Brigham. That there had been no publication of the pendency of said suits — that plaintiff below, who was the counsel in said suits, and procured said judgments, and said jndgments were rendered upon fictitious demands, were never proven before the auditors. That Webster and the owners of the half-breed tract of land, or some of them, were prevented from opposing and defending by the fraudulent representation of plaintiff below. That the sale was in fact never made by Sheriff Taylor. That the whole return *of the exe- *475
cutions by sheriff Taylor was a fraudulent and false return, as set forth in bill of exceptions No. 5.

8. The Court below erred in excluding from the jury the record of the deed from Taylor to Barrett, as referred to in bill of exceptions No. 6.

9. The Court below erred in refusing the instructions severally prayed for by defendant below as stated in bills of exceptions from 1 to 8, inclusive.

Miller & Hall, for plaintiff in error.

Starr & Walker, for defendant in error.

Per Curiam, Mason, Chief Justice. — In the examination of this case we shall first enquire whether the owners of the half-breed tract had such a title to the land in con-

troversy as to enable the purchaser at a sale on an execution against them to maintain an action of ejectment, or its equivalent, under our statute, an action of right.

In the year 1824 the Sac and Fox tribes of Indians relinquished to the United States by treaty "All their right, title, interest, and claim to the lands which the said Sac and Fox tribes have or claim within the limits of the state of Missouri, which are situated, lying, and being between the Mississippi and Missouri rivers, and a line running from the Missouri at the entrance of the Kansas river, north one hundred miles to the north-west corner of the state of Missouri, and from thence east to the Mississippi, it being understood that the small tract of land lying between the rivers Des Moines and the Mississippi, and the section of the above line between the Mississippi and the Des Moines, is intended for the use of the half-breeds belonging to the Sac and Fox nations, they holding, however, by the same title and in the same manner as other Indian lands are held." The land in controversy is a portion of this half-breed tract.

Two or three important questions have been raised as to the effect of this treaty. In the first place, is this half-breed tract thereby ceded to the United States? The cession embraces all the lands which lie in the state of Missouri, and comprehended within certain boundaries. The half-breed tract is within those boundaries but not within the state of Missouri. If it was intended to cede all the lands lying within those boundaries, why prefix the description of their location being within the state of Missouri? This portion of the description was doubtless intended to have some effect, and we, therefore, conclude that these lands, which were thus dedicated to the use of *476 the half-breeds, were *not by that treaty ceded to the United States; and if while that state of things existed, the beneficiaries had all become extinct, the lands would have reverted to the Sac and Fox tribes of Indians.

But in 1832, another treaty was held with these Indians in which the following tract of country was ceded to the United States: "Beginning on the Mississippi river at the point where the Sac and Fox boundary line (as established by a previous treaty) meets that river, thence up said boundary line to a point fifty miles from the Mississippi, measured on said line; thence in a right line to the nearest point on the Red Cedar of the Iowa, forty miles from the Mississippi river; thence in a right line to a point in the northern boundry line of the state of Missouri, fifty miles measured on said boundary line from the Mississippi river; *thence by the last mentioned boundary line* to the Mississippi river and the western shore of said river to the place of beginning."

This cession includes the half-breed tract, and shows that the parties to these treaties did not understand that tract to have been ceded by the treaty of 1824. It was, however, fully ceded by this treaty of 1832.

A more difficult question growing out of this treaty of 1824, relates to the title which the half-breeds acquired by that treaty. They were to hold "by the same title, and in the same manner as other Indian lands are held." From this it has been contended that the half-breeds were to hold this land in the same manner in all respects as though they were a nation by themselves, including the qualified right of sovereignty which the Indian tribes are permitted to exercise in their own territories; that by virtue of these treaties no new rights were acquired by the United States — the rights of the Sac and Foxes having been merely transferred to the half-breeds; that until the rights of this new nation shall have been extinguished by treaty with them, our territorial laws could rightfully exercise no control over these lands, any more than over those of the Sioux or Pottawattomies, lying within our territorial limits; and that, therefore, the sale of the half-breed tract on an execution

against the owners, was an absolute nullity and gave no right of property to the plaintiff in this suit.

We do not think this a correct view of the subject. The treaty of 1824 conferred upon the half-breeds the right of private property in the lands — not that of sovereignty over them. The provision that they were to hold it by the same title and in the same manner as other Indian lands are held, was intended principally, if not entirely, to prevent them from transferring their property without the consent of the United States, and the jurisdiction of the latter became entire and absolute. *The title of the half-breeds was not disturbed by this latter treaty, inasmuch as a cession of land from one nation to another does not affect the right of private property.

*477

On the 30th of June, 1834, an act of Congress was passed, declaring that "All the right, title and interest which might accrue or revert to the United States, to the reservation of land lying between the Mississippi and Des Moines rivers, which was reserved for the use of the half-breeds belonging to the Sac and Fox nations, now used by them, or some of them, under a treaty made and concluded between the United States and the Sac and Fox tribes or nations of Indians, at Washington, on the 4th day of August, 1824, be and the same are hereby relinquished and vested in said half-breeds of the Sac and Fox tribes or nations of Indians, who, at the passage of this act are under the reservation in the said treaty entitled by the Indian title to the same, with full power and authority to transfer their portions thereof by sale, devise, or descent, according to the laws of the state of Missouri." Since the passage of this act, but little doubt exists as to the exact nature of the half breed title. To ascertain the number of interests in this tract, their extent, and who are entitled to them, may still occasion great difficulty, but when once ascertained, the precise nature of their titles is easily understood, being nothing more or less than a full fee sim-

ple title, as tenants in common. It matters not what was the previous half breed tenure. To those then holding, was given the full and absolute ownership. The change effected was not beyond the scope of lawful legislation, for if, as has been contended, the half-breeds under the treaty were each individually entitled to a life occupancy, the change effected by this act of 1834 is no greater than though estates entail had been changed into fee simple titles. Although a legislature may not have the power to destroy vested rights, it can create or augment them, even though the interest of posterity should be affected thereby.

Nor is it material, so far as the efficiency of this act of 1834 is concerned, whether or not it violates the treaty of 1824, by making a different disposition of those lands from what was stipulated for in that treaty. Government is certainly under the strongest moral obligation to preserve inviolate the faith of all treaties, but if the legislative power, which in such matters is sovereign, sees proper to violate this duty, there is no power in the judiciary to prevent it. True, a treaty is by the constitution declared to be a supreme law of the land, but so is an act of Congress. The latter may repeal the former in the same manner that one statute may repeal another. It is an act of sovereignty, which, if the *judiciary could ar- *478 rest, they might paralyze all the energies of war itself, on the ground that the declaration of war was a violation of treaties.

Since the taking effect, therefore, of the act of 1834, the half-breed tract has been, to the fullest extent, individual property, and as such was by the organic act of the territory, placed under our municipal regulations. Any other construction would lead to the most serious inconveniences. The act just referred to, authorized the alienation of the interests of the half-breed owners, and it is a well known fact that to a very considerable extent they have already availed themselves of this privilege. Is that whole tract

Joseph [illegible] v. Reid.

against the owners. [illegible] exempt from taxation, right of property t[illegible], whether in the hands of

We do not thi[illegible] or of their assingees? This treaty of 1824 [illegible] the effect of establishing the private proper[illegible] the counsel for the plaintiff in them. The [illegible] are not now subject to our laws title and ir[illegible] so? It has been seriously doubted held, was [illegible] stipulation on the part of the state to them fr[illegible] lands forever from taxation, was [illegible] be placed beyond the reach of future

*477 legislation. The case of The State of New Jersey v. Wil-

mr[illegible] 7th Cranch R. 164, however, established that prin-

n[illegible] ciple, but the Court in that case went to the verge of judicial power. The principle contended for here would, by a very unnatural and unnecessary inference, not only exempt these lands from taxation, but place them beyond the range of all territorial or state legislation.

But it has been contended that the act of 1834 is a private statute, and therefore not now to be noticed, as it has not been set forth in the pleadings or the proof, we have had more serious doubts upon this subject than upon any other part of the case, but have come to the conclusion that it is such a statute as should be judicially noticed.

The rule followed in Kentucky has sound reason to support it, that in this country where all laws, public as well as private, are published in the statute book, the distinction between public and private statutes should no longer be preserved. 2d Pirtle's Digest, 19. The main reason of the English rule has certainly ceased. 3d Tomlin, 519.

But is this statute private? A statute is public which concerns the whole people. 7 Mass. R. 9, 10, Mass. R. 91 and 92. This act surrenders to the half-breeds the reversionary interest, and yields up the pre-emption right which the United States then had in this tract of land; so that although in regard to the half-breeds it is a private statute,

rd to the rights of the government, that is to people, it is a public law.

shall next proceed to enquire into the correct- *479
s of the decision of the Court below, rejecting the proof that "The judgment, execution, sheriff's sale, and sheriff's deed, constituting the evidence introduced by the plaintiff, were all procured by fraud, by the said plaintiff and others, and that the whole title of the plaintiff was based upon fraud and fiction."

The general rule that fraud vitiates all judgments as well as contracts, is to be taken with some qualifications. If vitiated, that fact cannot be shown on all occasions and by all parties. Although a contrary opinion has been sometimes entertained, the more recent and sounder doctrine seems to be that a party to a judgment cannot collaterally impeach it for frauds. 4th Scammon's R. 371; 8th Ohio R. 108; 22d Maine R. 130; 3d Johnson R. 168. Much less would a mere stranger be permitted to impeach it.

As a general rule, a judgment at law is a conclusive act, so far as not to be disturbed or even enquired into in another proceeding at law. Although obtained by fraud it is valid, until by a direct proceeding in chancery, instituted for that purpose, the remedial power of that Court is invoked, and the injustice which the rigid rules of the common law would enforce, is prevented.

But even a mere contract, however fraudulent, is not a nullity. It is valid to the parties to the fraud themselves, and as against all others, except those who have been directly injured thereby. If, therefore, a judgment were of no higher nature than a simple contract, Webster did not show himself in a condition to object to it for fraud. It was not sufficient that he had an adverse possession of the land in controversy. A defendant in ejectment has generally such a possession. Still where he shows no title he will not be permitted to prove the forgery of the deed on

which the title of the plaintiff rests. Adams Ejectment, 29, note.

What has now been said in relation to the defendant below not being permitted to show fraud, applies with still greater force to the objection that he was not allowed to show irregularity in the proceedings, as that there was no service, nor publication, nor demands proved before the auditor, &c. A writ of error would have been the appropriate mode of proving defects of such a nature, and no one but a party thereby injured could even there successfully seek a remedy.

Similar in character are the objections that have been raised on the ground of the unconstitutionality of the acts of the legislature, through which the indebtedness accrued and the judgments were obtained. 16 Pickering R. 87.

*480 *Judgments rendered under an unconstitutional law are not nullities. A sheriff levying and selling under such a judgment would not be a trespasser. 1st Chitty, 210, and note. And this seems to be a test upon that subject. 3d Peters. R. 193.

The case becomes still stronger when lands have been sold under such a judgment and transferred to the purchaser. If the defendant is willing to have his debt paid by the sale of his property under such a judgment, shall a stranger be allowed to interfere and disturb that arrangement? If this were permitted, the purchaser at a sheriff's sale holds his property for twenty years, at the mercy of any intruder who shall discover that the law under which the judgment was obtained was unconstitutional. 10th Peters. R. 471; 16th Pickering, 87.

Such a rule would produce the greatest inconvenience, by rendering titles insecure, as well by discouraging persons from purchasing at such sales.

The sacrifice at which the defendant's property must be sold could not be prevented by any waiver on his part, because the law would permit some troublesome neighbor to

set aside the judgment, which it might be the wish as well as the interest of both parties interested to have remain firm and effectual forever. The law will not thus countenance impertinence and intermeddling.

Nor is the reason of this rule modified in the least by the fact that the defendant below held the land in controversy by an adverse possession. Such a possession is within the reach of every intruder, and would (were a contrary rule to prevail) effectually protect his possession, if he could avoid the force of a writ of forcible entry and detainer.

What difference in fact can it make to the defendant below, whether the action against him be brought by the plaintiff below or by any other "owners of the half breed tract?" The true rule in all these cases seems to be that unless the defendant in ejectment has some defense that would be good against the former owner, he cannot object to a forged or fraudulent deed, nor to the fraud, irregularity, or unconstitutionality of the proceedings by which the present owner has acquired it.

As corollaries to the conclusions attained as above, it follows that the Court below did not err in admitting evidence of the judgment, execution, levy, and return of the sheriff, nor in admitting the sheriff's deed, nor in overruling the motion for a non-suit, as set forth in the first, second, and seventh bills of exceptions.

The next point to be considered is the proof of title derived from Na-ma-tau-pus, which was proffered by the defendant below, and rejected by *the Court. *481 It is very questionable whether such proof should have been admitted, even if Na-ma-tau-pus had been fully proved to have been one of the Sac and Fox half-breeds. The title of the land was in the hands of a purchaser under a sale directed by a Court of general jurisdiction. If that judgment were irregular, fraudulent, or founded upon an unconstitutional law, could one of the parties to the judgment obtain a remedy in this collateral manner?

But even if the law should permit such a course, we think there was no sufficient evidence that Na-ma-tau-pus was one of the Sac and Fox half-breeds. The principal witness on this subject was one who did not understand the Indian language. He stated that on one occasion he was in company of several whites and Indians, and that then this individual was said to be a half-breed of the Sac and Fox tribes; at another time the witness took the acknowledgment of the deed from Na-ma-tau-pus, when he heard several persons (a part of whom were under oath) state that they believed him a half-breed of the Sac tribe. His complexion indicated a half-breed. Witness had also heard some persons who had married half-breeds make similar statements as to his pedigree. From the necessity of the case, the same strictness of proof is not required in relation to pedigree as for most other purposes, still, the same general rules are observed.

The best evidence which the nature of the case admits is required where hearsay evidence in such case is allowed. It is the statements of relatives by blood or marriage who are generally best acquainted with the facts they state.

No evidence of that kind was offered in the present case. But even if the peculiar habits and manners of the Indians be such as to require a further modification of the rule of evidence, at least general reputation in the tribe might have been proved by persons who could understand the language. Bullard stated that several persons had informed him that such reputation existed. The original hearsay would have been infinitely better evidence than this hearsay of a hearsay.

The principles involved in the instructions asked and refused by the Court, have already been substantially discussed. If the conclusions above stated are correct, there was no error in refusing the instructions.

Judgment affirmed.

*THE PRESIDENT, DIRECTORS, AND COMPANY OF THE MINERS' BANK OF DUBUQUE, plaintiffs in error, *v.* THE UNITED STATES, on the relation of James Grant, prosecuting attorney, defendant in error. *482

Error to Dubuque.

The legislature has an unquestionable right, without judicial investigation, to repeal a bank charter containing a provision: "That if said corporation shall fail to go into operation, or shall abuse or misuse their privileges under their charter, it shall be in the power of the legislative assembly of this territory, at any time, to annul, vacate, and make void this charter" (*n*).

This was an information in the nature of a *quo warranto* filed by James Grant, the district prosecuting attorney, against the plaintiffs in error, requiring them to show by what authority they exercised the power and franchises of a corporation.

To this the defendants below pleaded the act of incorporation passed by the legislature of Wisconsin, before the erection of the territory of Iowa, approved 30th November, 1836.

To this the plaintiff below replied the act of the legislative assembly of the territory of Iowa, entitled "An Act to repeal the said charter, and to provide for winding up the affairs of the same," passed 10th May, 1845.

To this the defendants below filed a joinder, setting forth that the said act of the legislative assembly of Iowa was passed without notice to them, and without any evidence of abuse or misuse by them of their corporate powers and privileges.

To this rejoinder the plaintiffs below filed a demurrer, which was sustained by the Court, at November term, 1845.

(*n*) See Miners' Bank *v.* United States, 1 Gr. 553.

Errors assigned: —

1. That the judgment of the Court below that the demurrer of the plaintiff below to the rejoinder of the defendants should be sustained, was erroneous, and ought to have been that the same should be overruled.

2. That judgment on said demurrer should have been in favor of the plaintiffs in error, and not the defendants in error.

3. That the judgment in said case should have been *483 rendered in favor *of the plaintiffs in error, and not in favor of the defendants in error, by the Court below.

DAVIS & CRAWFORD, for plaintiffs in error, contended,—

1. That the charter is a contract, and that one of the provisions of the contract is, that the corporation shall exist twenty years, unless it abuse or misuse its privileges; that the presumption of innocence applies to this case until there be proof of guilt; and the act repealing the charter is no evidence that there had been abuse or misuse of its privileges.

2. That the enquiry whether there had been such abuse or misuse is a question for a judicial tribunal, and is not a rightful subject of legislation.

3. That the charter being a contract, the repeal of it without a proper finding of the fact of abuse or misuse, would violate the obligation of the contract, and would, consequently, be void.

4. That the power of repealing this charter, if possessed at all, is possessed by the Wisconsin legislature; but that even this body cannot, and that it falls back upon the common law.

GRANT & HEMPSTEAD, for defendant in error, replied and contended, —

1. That Courts cannot go behind the act of the legis-

latnre to enquire into the validity of any law; that Courts will look only into the law itself to ascertain its constitutionality, and will not enquire into the policy and justice of it; that where the Courts find a law upon the statute book, it will presume that every thing was done which was required to be done; that if the Court is authorized to go behind the act of the legislature in this case to astertain whether there was evidence of misuse and abuse of the charter, then it can do so in any other case, and enquire whether this act was passed by the necessary number of votes.

2. That the 12th section of the organic law of Iowa gives to the legislature of Iowa the right to repeal this law.

3. That there was no law prohibiting the said legislature from passing said repealing act.

4. That the reservation of the right to repeal the charter was intended to vest that right in the legislative power of the government under which the bank then was, or might at any time be.

Per Curiam, Mason, Chief Justice. — The validity of the late act of the legislative assembly of this territory, repealing the charter of the Miners' Bank of Dubuque, is brought up now for adjudication. On the *one side it is contended that all acts of incorporation *484 of this kind may be rightfully repealed whenever, in the opinion of the legislature, the public good requires it; that the primary object of the incorporation of a bank is the public convenience; that the furnishing of a circulating medium, to serve as money, is a high attribute of sovereignty; that if one legislature has the right to delegate this power, another may resume it, and that a bank is only to be regarded in the same light as a public officer of the government, whose office may be abolished at any time, and the incumbent discharged by an act of the leg-

islature. On the other, it is contended that such an act of incorporation is a mere private contract, and, for that reason, placed beyond the reach of hostile legislation.

The power of our legislature being confined to "rightful subjects of legislation," and the bill of rights contained in the ordinance of 1787 having declared that the legislature ought not to interfere with private contracts previously formed in good faith, such contracts are just as sacred here, as they are under the federal constitution within the states. The principle is well settled in the states that a public corporation is always under the control of the legislature, but a private corporation, or private grant, is protected from legislative encroachment. A public corporation is one created for public purposes, though private rights and interests are often therein deeply involved. The charter of a town or city is none the less subject to the legislative will from the fact that a change therein, or an absolute repeal thereof, will injuriously affect the individual interests of the corporators.

If, therefore, the primary object in the incorporation of a bank is the promotion of the public welfare, it is a public corporation, and under the entire control of the public will, as expressed through the legislature. But, if the chief purpose of such charters is the promotion of private interests, and the conferring of favors upon individuals, the analogy of decisions would seem to point to the conclusion that the legislature would not possess the general power of repeal. Some of the adjudged cases go far to sustain the former of these views in relation to bank charters. See Bank of Utica *v.* Smedes, 3 Cowen, 684; and Young *v.* Bank of Alexandria, 4 Cranch, 384, 388.

But whatever difference of opinion may be entertained on this subject, the right of repeal is clearly unquestionable where such right is stipulated for in the charter itself. Even if it is to be regarded as a private contract, it is certainly no breach of that contract to insist upon and enforce

its own terms and conditions. It is insisted that the *stockholders of the Miners' Bank of Dubuque ac- *485
cepted this charter under such an express stipulation.

The 23d section of that charter provides that "If said corporation shall fail to go into operation, or shall abuse or misuse their privileges under this charter, it shall be in the power of the legislative assembly of this territory, at any time, to annul, vacate, and make void this charter." Was it the intention of the legislature by this provision to reserve to themselves the right of repeal after, by a judicial investigation, it had been ascertained that some of the above mentioned contingencies had happened, or is it, by a fair construction, to be inferred that they intended to reserve to themselves the power of determining upon the happening of those contingencies? We think the latter the most reasonable interpretation of the language used.

Suppose the bank had failed altogether to go into operation, must there have been a trial by jury to ascertain that fact before the legislature could repeal the act of incorporation? Or suppose there had been such an abuse or misuse of the privileges granted as is contemplated by this provision of the charter, how is a judicial inquiry to be instituted? Would the Court act as a committee of the legislature for the purpose of collecting evidence in order to enable the latter to make a decree? Where would it find authority for such a course? All judicial proceedings contemplate final judicial action. If upon the allegation that the contingencies provided for in the above mentioned clause of the charter had happened, and a writ of *quo warranto* were to issue, and the truth of the allegations should be fully sustained, it would be the duty of the Court to annul the charter by its own decree, and not stop short while in full career, and turn the case for this purpose over to the legislature. Nor can we presume the legislature to have been guilty of the absurdity of reserving to itself the right to repeal a charter, only after the same had been va-

cated and declared null and void by a decree from the proper Court. It is our duty to construe all statutes so as to give force and meaning to all their provisions, where it is possible so to do. The legislature, through its committees, have the means of investigating facts, and we have little doubt, but what by a proper construction of the repealing power above set forth, they reserved to themselves the right to annul the charter of the bank, whenever, through their own appropriate organ, it had been ascertained that any of the contingencies therein provided for, had happened. It amounted to an absolute power of repeal, coupled with a legislative pledge that such power should never be exerted only in the cases therein provided.

*486 *This view of the case is strengthened by another circumstance. It is a well known historical fact, that at the passage of this act of incorporation, the unqualified right to repeal any bank charter was warmly contended for by many of the presses and public men in the country. The charter of the bank of the United States had recently been revived by the legislature of the state of Pennsylvania, and had added much to the warmth and importance of the discussion. It was doubtless for the purpose of setting that question at rest, so far as related to the banks they were about to create, that the legislature of Wisconsin reserved to itself this power of repeal. Acting within the scope of their authority, their decision is final, and we cannot look behind it. It follows that the demurrers were properly sustained, and the decree of the District Court is accordingly affirmed.

WILLIAM M'CAULEY *v.* THE UNITED STATES.

Certiorari to Van Buren.

Where a prisoner on an indictment for murder, pleads guilty, the Court must ascertain by examination of witnesses, whether the crime be murder or manslaughter, and the examination of the witnesses and the decision of the judge must appear of record (*o*).

As a general verdict of guilty would be defective, so is a general plea of guilty indefinite as to the degree of crime, until ascertained by evidence.

The order of the Court changing venue, is presumptive of its own regularity, and conclusive, unless something to the contrary be shown by the record.

At the September term, 1844, of the District Court of Washington county, William M'Cauley was indicted for the murder of Don Ferdinand Coffman, on the 4th day of August preceding, and, on application, the venue was changed to Van Buren county.

At the April term, 1845, of the District Court of Van Buren, the prisoner M'Cauley, then on trial, prayed the Court for the privilege of withdrawing his plea of "Not guilty," and entering the plea of "Guilty," which was entered in form, and judgment and sentence of death pronounced by the Court.

The record and proceedings were removed to this Court on a *certiorari* sued out by the prisoner's counsel, and on motion of Joseph C. Knapp, *the prosecuting *487 attorney, an order was granted that the sheriff of Van Buren should forthwith bring into Court the said William M'Cauley, which order the sheriff obeyed, and the said prisoner being in Court, his counsel assigned for error in the proceedings in the Court below:—

(*o*) See, as to judgment on plea of guilty, Rev. §§ 4861, 4862, 4863, 4870, 4871, 4872, 4874, 4875, 4876, 4877, 4878.

William M'Cauley *v.* The United States.

1. There was no finding by the Court or jury below, as to the offense, whether murder or manslaughter, as required by law.

2. The record does not show any conviction upon which the Court could pass judgment.

3. The Court below had no jurisdiction of the cause. The change of venue having been sent out of the second district without authority of law.

HALL & MILLS, for plaintiff in error.

KNAPP & THOMPSON, for the United States.

PER CURIAM, MASON, CHIEF JUSTICE.—The statute declares that "In all trials for murder, the jury before whom such trial is had, if they find the prisoner guilty thereof, shall ascertain in their verdict whether it be murder or manslaughter, and if such prisoner be convicted by confession in open Court, the Court shall proceed by examination of witnesses in open Court to determine the degree of the crime, and shall pronounce sentence accordingly." It appears that in the present case, on the trial below, after the testimony on the part of the prosecution had closed, the then defendant withdrew his plea of not guilty and pleaded guilty to the indictment, and was thereupon sentenced to be hung. Nothing appears on the record showing that witnesses were examined by the Court after he had pleaded guilty, or that the Court in any manner decided whether the offense were murder or manslaughter, as contemplated by the statute. This we think was an error.

Had the trial before the jury proceeded, and a general verdict of guilty alone been rendered, it would have been clearly defective. The general plea of guilty only stands in the place of such a general verdict, and was so intended by the legislature. The law seems to regard manslaughter as a species of murder. On an indictment for the higher offense, a conviction may take place for the lower; neither a general verdict or a general plea of guilty is permitted

where murder alone is charged in the indictment, but an enquiry and decision as to the more precise nature of the offense are rendered necessary. That enquiry and decision should appear of record. The record shows that before the plea of not guilty had been withdrawn, the testimony in chief, on the part of the *prosecution, *488 had all been presented. We see no valid objection, therefore, on the ground that the Court did not hear testimony to enable it to decide on the precise nature of the offense, but the record should have shown what the conclusion of the Court upon that subject was. It is true that from the subsequent action of the Court there is a strong inference to be drawn as to that conclusion, which would have been sufficient to have sustained a judgment in a civil case, but in a criminal, and especially in a capital case, greater precision is required.

The objection that there should have been no change of venue out of the district, at least that such change was irregular previous to the joining of issue, is not well taken. The law regulating the change of venue in criminal cases, is the statute of 1839, see laws of 1842–3, page 155, section 60, the law of 1843 (see same laws, page 639), so far as it precribes the pre-requisites for a change of venue, or prevents a change to another district, being limited to civil cases. The discretion is lodged with the Court to direct a change of venue for good cause shown. It is not declared that such change shall not take place previous to joining issue; not that it shall not be made to another district.

And besides, the order of the Court directing a change of venue, is presumptive of its own regularity, and is conclusive, unless something to the contrary is shown by the record. Such is not the case in the present instance. To have taken advantage of the objections here urged to the change of venue, the grounds of that change should have been properly brought before us by a bill of exceptions.

Judgment reversed, and case remanded to Van Buren county.

The following are the remainder of the cases decided in 1846, with a brief of the points determined, and which are unavoidably crowded out of this volume. They will be reported in full in the second volume of "Iowa Reports."

REPORTER.*

Webb & Thurston *v.* Mauro.

If A draw a bill on B, payable to the order of C, appending the word "Agent," without stating for whom he is agent, he is personally liable; and in an action brought *489 by C against the drawer and acceptor, A is an *incompetent witness to prove his agency, or the genuiness of letters going to establish such agency, and the liability of defendant.

Gardner *v.* Able.

In a judgment by default in an action of assumpsit, where the declaration contains a special count on a note, and a common count, and the note subjoined constitutes the only bill of particulars, it is not necessary to enter a *nolle prosequi* as to the common count. In a case like this, the District Court should not and would not allow anything but the note to be given in evidence under the special or common count.

Hampton *v.* Pearce.

A general plea of fraud to an action of assumpsit on a note, &c. is good.

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*The expectations of the reporter seem never to have been realized, for we have been unable to find that any of these cases have beed "*reported in full*" in the "*second*" or any other volume of the "Iowa Reports." These cases are mere abstracts of the points decided, and it is not deemed important to make any references to subsequent adjudications.

A plaintiff who declares upon a simple contract must come into Court prepared to show, not only that he has a good cause of action, *prima facie*, but also to rebut everything which implicates its validity *ab initio*, or which tends to prove its discharge, satisfaction, or release.

HAMPTON *v.* THE UNITED STATES.

An informal caption to an indictment is not a ground of error, if the description cannot be mistaken.

The words "In and upon one A B, then and there being, unlawfully did make an assault," &c. sufficiently refers to the county in the margin, as the place where the offense was committed.

It is not improper that the judge of the District Court should, on the trial of a prisoner, adjourn the Court, jury, and counsel to a neighboring house in town to receive the testimony of a sick witness, if the prisoner is not put to any substantial inconvenience.

The Court, in making such an order, only exercises a warrantable discretion to attain the ends of justice.

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*SIMMONS *v.* THE UNITED STATES. *490

On an indictment for permitting gaming in a grocery, if the jury find a verdict of guilty, but neglect to fix the fine, it is not erroneous for the Court to impose it, if it does not exceed the lowest amount which is imposed by law for the offense, as the defendant cannot be prejudiced by such a judgment.

BENEDICT *v.* WESTON.

In contracts for the sale of lands, by which one agrees to purchase and to convey, the undertakings of the respec-

tive parties are always dependent, unless a contrary intimation clearly appear.

The seller ought not to be compelled to part with his land without receiving the consideration, nor the purchaser to part with his money without an equivalent in return.

If either vendor or vendee wishes to compel the other to fulfill his contract, he must make his part of the agreement precedent.

The time fixed for performance is deemed the essence of the contract; and if the seller is not ready and able to perform on the day, the purchaser may elect to consider his contract at an end.

Luckey *v.* Pepper.

A note in the following words will not entitle the maker to the days of grace: "Good for ——— dollars out of my grocery. A. B."

A note or bill of exchange for the payment of money *on demand* does not entitle the payee to the days of grace.

Jennison *v.* Foltz.

A mortgager whose mortgage has been foreclosed has a right of redemption under the act of February, 17th, 1842; and may remain in possession of the land sold under the mortgage for fifteen months, the term allowed to redeem the same.

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*491 *Van *v.* Manning.

This case was decided at a previous term and determined, that an act of assembly legalizing the acts of a jus-

tice of the peace could not have such a retrospective operation as to work injustice to individuals, and that a plea to the jurisdiction, before the legalizing act, would be sustained, &c. A rehearing of the case was ordered. And the Court say that the judgment, after overruling of the demurrer to the plaintiff's replication, that the plaintiff should recover of the defendant his damages, &c. was erroneous. 1. That the judgment should have been *respondeat ouster*. 2. That if judgment had been in chief, there should have been a jury of enquiry. Judgment set aside, and a new trial ordered.

BISSELL & EMMONS *v.* FALES.

A receipt for lumber to be sold on commission is not assignable so as to vest the legal interest in the assignee, and to authorize him to bring suit in his own name.

NEIL *v.* NEIL.

Where a defendant obtains a judgment against the plaintiff before a justice of the peace upon a set-off, the Supreme Court will not reverse the same because there could not be found among the justice's papers the bill of particulars or set-off.

PELTON *v.* JONES, BACON & CO.

It is not a ground for new trial that it was discovered, after trial, that one of the jurors had expressed an opinion adverse to the plaintiff in error.

*492 *CHADWICK *v.* BROWN.

A rented a house of B, and he underlet to C, and he left indebted to B, while B was also indebted to A for the rent. B sued out an attachment against C, which was placed in the hands of D, a constable. The property attached was sold by order of a justice of the peace. Before the sale, it was agreed between A, B, and C, that C should pay to A his debt, and A discharged B of his liability. D sold the goods and received the money, and paid it to the justice of the peace previous to the judgment rendered in favor of B. A demanded the money of D, which he refused to pay over, the money being in the hands of the justice. An attachment was sued out from another justice of the peace by other creditors of B, and the first justice of the peace garnisheed, &c. A sued D, the constable. Held, that he could not recover, and that the promise not being in writing, was within the statute of frauds.

DICKENSON *v.* CHASE *et al.*

The assignee of a note given for the purchase money of land cannot, in equity, enforce the original lien of the vendor against the land. The equity arises to the vendor, but cannot be transferred.

SMITH *v.* BARRETT.

The bill was demurred to because the defendant is described as A. G. Smith. If this was an erroneous description, the defendant should have pleaded in abatement, and given his true name, Albert G. Smith.

MATTOON *v.* VANATER.

If it appears, negatively, by the record, that the defendant was not called on a default, or that there was no proof of the endorsement of a note, it is not ground of reversal. In relation to these matters, the Court below will also be presumed to have complied with the requisitions of the statute, unless the contrary is made manifest by the record.

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*JONES *v.* DONAHOO. *493

In an action of trespass for cutting timber on a tract of government land, occupied as a "claim," unless the evidence goes to show that such claim is so marked out that the boundaries can be readily traced, and the extent of the claim easily known, the plaintiff should be non-suited.

CHANEY *v.* OSTRANDER.

An affidavit to obtain an attachment must state that so much is due, and that affiant believes that the defendant is about to remove, or dispose of his property *with intent to defraud his creditors.*

PECK *v.* AYRES.

If the record of the proceedings is not shown affirmatively to be irregular, the judgment below will be affirmed.

WEST *v.* HATFIELD.

In a suit before a magistrate for forty-eight dollars, the defendant filed a set-off for fifty-one dollars ninety-two cents. Objected to for want of jurisdiction. The set-off

was allowed. On the trial in the District Court, the justice was admitted as a witness to prove that before the trial in his Court, the defendant informed him he should claim from the plaintiff a balance of seven or eight dollars. This indicated that he admited a part of plaintiff's demand, and that the balance claimed was less than fifty dollars, and within his jurisdiction.

M'Daniel v. Spencely & Harker.

In an action of forcible entry and detainer, a witness was offered and objected to, on the ground of interest, which was, that he was mining on the grounds in dispute, under a parol lease from defendant. For this supposed interest he was rejected. This was erroneous. The
*494 witness *had no interest in the event, as the right of property did not come in question.

Porter v. Cox.

A record offered in evidence, which is not authenticated with the seal of the Court, may be proven by parol testimony, to be a true copy of the record. An exemplification of a record is of no higher authority than a sworn copy.

Bruce & Lingle v. Sweatland.

In an action upon a penal bond of five hundred dollars, for the conveyance of land, upon default being made, a jury was sworn to enquire, as well of the debt as of the damages. The jury assessed two hundred and fifty dollars, and the declaration admitted the receipt of two hun-

dred and sixty-two dollars. This being for more than the penalty, verdict set aside and new trial ordered.

White *v.* Mallord.

Under the statute regulating proceedings before justices of the peace, page 313, section 6, the owner of a note, negotiable by mere delivery, may prove the loss of it, and recover the amount of the maker.

O'Sullivan *v.* Brown.

In order to determine that a case was improperly stricken from the docket in the Court below, the facts upon which the action was founded, as well as the reasons of the Court for sustaining it, in order to become a part of the record, should be made so by bill of exceptions.

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*Longacre *v.* Simpson. *495

In an action by petition and summons, if the petition is in assumpsit and the summons in debt, it is erroneous.

The return of the sheriff, "Served by reading and delivering an attested copy," does not show upon whom it was served, and is defective.

The judgment should be in debt and damages, and not damages alone.

Mason, Chief Justice, dissenting; that the service is good, that the action is *sui generis*, and the parties should not be confined to the technicality of formal actions.

INDEX.

ABATEMENT.

1. The proper mode of taking advantage of a defective affidavit, or bond, on a writ of attachment, is to move to quash the writ.
Carothers v. *Click*, 54.
2. An appearance of defendant to obtain a continuance to traverse the issue of fact is a waiver of a plea in abatement to the writ.
Hotchkiss v. *Thompson*, 156.
3. There is no authority for issuing a capias, merely that it may act as the basis for an attachment, when the defendant is already in court. And a motion to quash the same may be made after a plea in abatement to the attachment. *Darlington* v. *Irwin*, 421.
4. Where there is a plea in abatement to the jurisdiction of the justice of the peace who tried the cause below, and the parties afterwards go to trial on the merits, without any disposition being made of the plea, the defendant pleading it cannot reverse the judgment because the plea was undisposed of. *Starr & Burgess* v. *Wilson*, 438.
5. If a defendant wishes to take any advantage of a plea in abatement, he should call it up before going to trial. *Ib.*
6. Where an attachment bond and the declaration set out the plaintiff's name as *Henry*, and the writ of attachment ran in the name of *Hezekiah* Musgrave, it was properly quashed.
Musgrave v. *Brady et al.*, 456.

ACCOUNT.

1. The action of Account is obsolete, and cannot legally be brought in Iowa. *Stuart* v. *Kerr*, 240.
2. A plaintiff in an action of assumpsit, founded upon a book account, is not allowed upon his own motion to introduce his books of entry as evidence in his own behalf. *Lowe & Hickok* v. *Ganby*, 281.
3. Our statutes in relation to this species of evidence have changed the rules, which at common law allowed a party to testify to their correctness, as charged in the demand, or set off. *Ib.*

ACTIONS.

1. Where actions on the case are mentioned in general terms, assumpsit is included. *Maltby & Bolls* v. *Cooper*, 59.
2. The action of forcible entry and detainer is not the proper action for trying titles of any description. *Settle* v. *Henson*, 111.
3. The writ of right does not lie to recover the possession of a "claim." *Doolittle* v. *Harrington*, 226.
4. Action of Account obsolete (see Account), 240.
5. The action of trespass *quare clausum fregit*, being local, must be instituted in the county where the trespass was committed. *Switzer* v. *Goudy*, 248.
6. The action of debt lies by the assignee of a promissory note against the maker. *Phillips* v. *Runnels*, 391.
7. The assignee may sue in his own right, and may maintain the same kind of action as the payee might have maintained. *ib.*
8. A guardian cannot maintain an action against an administrator for a failure to perform an order of the probate judge. *Anderson* v. *Cameron et al.* 436.

ADMINISTRATORS.

1. The statute which allows guardians the right to demand, sue for, and recover all money belonging to their wards, from executors and administrators, as soon as the same may be collected, does not authorize them to institute suit in their own names upon administrator's bonds for a failure to perform the orders of a probate judge. *Anderson* v. *Cameron et al.* 436.

ADVICE.

1. The rule which excludes testimony in relation to communications made to counsel, has never been extended further than to embrace disclosures made to practicing attorneys for obtaining professional advice. *Pierson* v. *Steertz*, 136.
2. The exemption must be confined to cases of strict professional intercourse. *ib.*
3. It is not the province of the Supreme Court to give advice to the District Courts. *Long* v. *Long*, 381.

AFFIDAVITS.

1. An affidavit for an attachment may be amended as well as to substance as form. *Jackson* v. *Butler & Fletcher*, 230.

AGE.

1. A brother and sister must each be over the age of sixteen years to incur the guilt of incest. *United States* v. *Hiler*, 330.

AGENT.

1. If A draw a bill on B, payable to the order of C, appending the word "Agent," without stating for whom he is agent, he is personally liable; and in an action brought by C against the drawer and acceptor, A is an incompetent witness to prove his agency, or the genuineness of letters going to establish such agency, and the liability of the defendants. *Webb & Thruston* v. *Mauro*, 488.

See EQUITY, 14.

AGREEMENT.

See CONTRACT.

AMENDMENTS.

1. A clerical mistake in issuing the writ in assumpsit, where the precipe and declaration shows the action to be debt, may be corrected by amending the writ to correspond with the precipe and declaration. And a writ of attachment and the affidavit on which it was issued, as auxiliary process, may also be amended.
Jackson v. *Fletcher & Butler*, 230.
2. On a certiorari in pursuance of the act of January 14, 1840, if the bond is substantially defective, it cannot be amended and the defect supplied, in the District Court. *Perry & Headley* v. *Benner*, 340.
3. The certiorari is another mode of taking an appeal. In an appeal proper, the statute expressly gives the right to correct a defective bond. Not so in the certiorari act; and the Court will not allow an amendment, and enlarge the opportunity for a second jury trial. *ib.*

APPEAL.

1. Appeals do not lie from the boards of county commissioners to the District Courts, on account of their omitting to discharge some specific duty involving no discretion. [*county*, 31.
United States ex rel. Davenport et al. v. *Commissioners of Dubuque*
2. An appeal lies from the District Court, although the decree was for less than $25.00. *Burge* v. *Burns & Snyder*, 287.

APPEARANCE.

1. By an appearance and pleading, the defendant waives all defects in the process and the service. *Bell & Pierson* v. *Achison*, 21.
2. Where there is no return indorsed on the summons, that defect is cured by the appearance of the defendant. *Hall* v. *Biever*, 113.
3. An appearance of a defendant to obtain a continuance to traverse the issue of fact, is a waiver of the plea in abatement to the writ.
Hotchkiss v. *Thompson*, 156.

4. The appearance by attorney and filing a plea with another defendant, dispenses with the necessity of service of process, and is a waiver of all objections on that score.
Lorimier et al. v. *Bank of Illinois*, 223.

5. Where a defendant appears by his attorney and consents that a judgment may be entered against him, with stay of execution, &c. it is a waiver of objections to the jurisdiction of the Court, and of any irregularity in the mesne process. *Switzer* v. *Gowdy*, 248.

6. If a defendant, on the back of the declaration, waives service and agrees to enter an appearance at the first term, he is estopped from a motion to dismiss the case for the want of a summons formally issued. *Humphreys* v. *Humphreys & Co.* 359.

7. Where the transcript of the justice of the peace shows an appearance by attorney, on a motion to quash the attachment, it will be regarded as a general appearance, and the defendant will be estopped from a motion to dismiss the cause when taken to the District Court on an appeal. *Deshler* v. *Foster*, 403.

ARBITRATION.

1. In an action of assumpsit upon promises made subsequent to an award, and in conformity therewith, parol testimony to prove that other matters than those contained in the written submission, were submitted to the arbitrators, is admissible. *Dice* v. *Yarnel*, 241.

ARRAIGNMENT.

1. The omission in the record of an arraignment is sufficient grounds to reverse a judgment. *Powell* v. *The United States*, 17.

ASSAULT.

1. If in an indictment it be charged that the assault was made with an *axe*, the Court will infer that it was made with a "*deadly weapon*."
Dollarhide v. *United States*, 233.

ASSIGNEE, ASSIGNMENT, &c.

1. Where a note, made payable to "A B or order," is endorsed in blank, the holder may sue in his own name; or he may sue in the name of A B, to his own use. But in this case any defense available against A B may be set up against the holder of the note.
Temple v. *Hays & Hendershott*, 9.

2. Where suit is brought in the name of the payee for the use of the endorsee of a promissory note, the maker may set up want of consideration. *Long* v. *Long*, 43.

3. The holder of a note endorsed in blank has a right to sue in the name of the blank endorser for his use.
Gray v. *Phillips, for the use of Kenedy*, 430.

4. Where an assignment was valid at the time it was made, the transaction will not be effected by a subsequent statute, prescribing a different mode of assignment, although such statute was passed prior to the institution of the suit. *Creighton* v. *Gordon*, 41.
5. In action by the payee of a note *not negotiable*, for the use of the assignee, it is not necessary to set forth the assignment, either in the declaration or in the copy of the note, such endorsement being only a piece of evidence.
Hickok & Ross v. *Labussier, for the use of Huner*, 115.
6. An assignee of a note may sue in his own name, although part of the amount be assigned to him. *Cochran & Ober* v. *Glover*, 151.

ATTACHMENT.

1. The process of attachment is merely auxiliary, and intended in certain cases to seize the property of the defendant and hold it liable to the result of the suit. When judgment is rendered, the efficacy of the writ of attachment is expended. *Carothers* v. *Click*, 54.
2. However defective, therefore, the affidavit or bond may be, upon which the writ was issued, judgment on that account will not be reversed. *ib.*
3. The proper mode of taking advantage of such defects is to move, at the proper time, to quash the writ of attachment. *ib.*
4. Where, by publication, a defendant in attachment is required to appear and plead by the *next term*, this refers to the next general term, provided a special term has not been duly ordered at the time of the publication. *Wilkie & Tuller* v. *Jones*, 97.
5. Attachment being a violent remedy, the law is to be strictly construed. *ib.*
6. Where there is a personal service, but judgment is rendered on the attachment and publication, it should be entered *in rem*, and not *in personam*. *ib.*
7. There is no authority for issuing a capias, merely that it may act as the basis for an attachment, when the defendant is already in Court. And a motion to quash the same may be made after a plea in abatement to the attachment. *Darlington* v. *Irwin*, 421.

See FRAUD, 8.

ATTORNEYS.

See ADVICE, 1.

BAIL.

See RECOGNIZANCE.

BAILMENT.

See INNKEEPER.

BANK.

1. The legislature has power to repeal a bank charter without a judicial investigation, where a right of repeal is reserved in the charter.
President, Directors, & Co. of the Miners' Bank, of Dubuque, v. *The United States ex rel. J. Grant*, 482.

BANKRUPTCY.

See PERJURY, 1, 2, 3, 4.

BASTARDY.

1. On complaint of, the writ and recognizance should be in the name of the United States. *Stratton* v. *Shintaffter*, 420.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. A promissory note, under seal, is negotiable in the same way as other notes not under seal, and the actual holder of such note indorsed in blank, may bring his action thereon against the maker.
Temple v. *Hays & Hendershott*, 9.
2. The statutory provision declaring that fraud may be set up against a note in the hands of an innocent assignee, does not apply to a note assigned before that statute took effect. Such defense is not available in the absence of statutes on that subject. *ib.*
3. Where a note made payable to "A B or order" is endorsed in blank, the holder may sue in his own name; or he may sue in the name of A B to his own use. But in this case, any defense available against A B, may be set up against the holder of the note. *ib.*
4. The act dispensing with the necessity of proving the signature of notes, bonds, &c. unless such signature had previously been denied under oath, operates upon cases previously commenced, and even upon those where the issue had been made up.
Inghram v. *Dooley et al.* 28.
5. Where a note is not negotiable at the time of its execution, it is competent for the legislature, by a subsequent act, to authorize the assignee to sue in his own name. *Harlan & Duncan* v. *Sigler*, 39.
6. Notes made payable to bearer, are transferable by mere delivery; and where the declaration set out that such note was "duly assigned and delivered," it was held to be no variance that the note was not endorsed. *Creighton* v. *Gordon*, 41.
7. Where an assignment was valid at the time it was made, the transaction will not be affected by a subsequent statute prescribing a different mode of assignment, although such statute was passed prior to the institution of the suit. *ib.*
8. The legislature may prescribe the form of instituting suits, and may direct the act to take effect in relation to notes previously executed, provided suits thereon be previously instituted. *ib.*

9. Notes made payable to "bearer" are negotiable independent of statute. *ib.*
10. The act of 1839, in relation to promissory notes, is an enlarging statute, merely rendering those notes, bonds, &c. negotiable which before were not so. *ib.*
11. Where suit is brought in the name of the payee, for the use of the endorsee of a promissory note, the maker may set up want of consideration. *Long* v. *Long, for use of Walling*, 43.
12. Although the words "witness my hand and seal" are contained in the body of an instrument, this does not render it a specialty, unless there be a seal or scroll actually attached thereto. *ib.*
13. A bond payable to A B alone, is a negotiable instrument under our statute. *Com's of Jefferson Co.* v. *Fox et al.* 48.
14. Money paid thereon by the maker, before it becomes due, is paid at his peril, whether he pays the same as garnishee or otherwise. *ib.*
15. The maker is not liable upon a garnishee process, unless the instrument is due, and shown to be in the possession of the defendant in the suit. *ib.*
16. Under our statute, it seems a person cannot make a note, bond, &c. which shall not be negotiable. *ib.*
17. The payee of a promissory note, given originally without a valuable consideration, is a competent witness in a suit by the endorsee against the maker, to prove that the plaintiff paid full consideration for the note, and that it was endorsed before maturity. *Strang* v. *Wilson*, 84.
18. The endorser, when not interested, is competent to prove facts arising after the execution of the note, but not to prove as to original liability of the maker. *ib.*
19. On notes and inland bills of exchange, it is not necessary that the presentation and notice of non-payment should be made by a notary, in order to charge the endorser. *Smith* v. *Ralston*, 87.
20. Where several promissory notes are declared on, in different counts of the same declaration, it is no ground of error that the jury rendered a general verdict, without specifying on which of the counts it was rendered. *ib.*
21. Where suit is brought by the endorsee and legal holder of a promissory note, against the maker, and a verdict is rendered for the defendant, on the merits, this will be a bar to a subsequent suit by the payee. *Levi* v. *McCraney*, 91.
22. Where a declaration contains a count on a promissory note, and also other counts, and it appears that the cause of action had not accrued on the note at the time suit was brought, the Court will not presume the verdict to have been rendered upon the count upon the note. *Hudson* v. *R. & O. Matthews*, 94.
23. The *lex mercatoria*, allowing three days grace on notes, bills, &c. is in force here, until a contrary custom is established. *ib.*

24. The statute which exempts the plaintiff from the necessity of proving the signature of a note, &c. unless denied under oath, does not extend to the endorsements. They must in all cases be proved.
Hardman v. *Chamberlin*, 104.

25. In an action by the payee of a note *not negotiable*, for the use of the assignee, it is not necessary to set forth the assignment either in the declaration or in the copy of the note; such endorsement being only a piece of evidence.
Hickok & Ross v. *Labussier, for use of Huner*, 115.

26. No formal notice of such assignment is necessary to render the maker responsible to the assignee. The suit being instituted for the use of the latter, is sufficient to put the maker on the inquiry; and if he pays money afterwards to the original payee, he does it at his peril. *ib.*

27. A blank endorsement of such a note, and the possession thereof by the person for whose use the suit is brought, is sufficient to raise the legal presumption of a transfer to him. *ib.*

28. Where the endorsement of a note is special, and made in the usual manner, the legal interest passes entirely to the endorsee, and he can only sue in his own name.
Sater & Wade v. *Hendershott, for the use of Redman & Eberman*, 118.

29. Such an endorsement is a transferable contract between the endorser, on the one side, and any subsequent holder on the other, and can only be rescinded by the mutual agreement of those parties. When the note comes again into the ownership of the payee, both these parties become united in his person, and he can then erase all the endorsements. *ib.*

30. The mere fact that a suit is instituted in the name of the payee for the use of the endorsee, is of itself no evidence that the payee is in *possession* of the note, and still less that he is entitled to bring suit thereon. *ib.*

31. Before the statute of Iowa in relation to promissory notes, it is doubtful whether the endorsee could sustain debt on a negotiable instrument. In case of a sealed instrument, therefore, which has been specially endorsed, inasmuch as the action must be debt, the endorsee may sue in the name of the payee to his use. The law will not, in such cases, compel him to try doubtful experiments. *ib.*

32. The payee of a sealed note, when he endorses it over in blank, thereby authorizes the endorsee to sue in his (the payee's) name, for the use of the endorsee; for the law enters into and forms part of the contract. If, therefore, after the note is thus endorsed, a statute authorizes the endorsee to bring debt thereon, in his own name, and even declares a transfer of the legal interest to him, this will not prevent him from suing in the name of the payee for his own use, for this would be impairing the obligation of a previous contract. *ib.*

33. Where a note is payable to A B, or bearer, it matters not who may be the plaintiff who brings the suit. *Hotchkiss* v. *Thompson*, 156.

34. Under the statute allowing the note to be filed in lieu of a declaration, any person holding the note, if payable to bearer, may sue in his own name. *ib.*

35. It is not a misdescription of a note to state that the defendant at —— made, &c. although it does not appear on the face of the note that it was given there. *Anderson* v. *Brown*, 158.

36. Where a note is executed by A, B, and C, jointly, and B sustains the plea of infancy, in an action brought against them on the same jointly, a judgment may be rendered against A and C without compelling the payee to commence *de novo*. *Coe et al.* v. *Hamilton*, 319.

37. Where a defendant has drawn an order on the plaintiff, under an agreement that plaintiff should not proceed in the collection of the money due plaintiff on a note until the money was actually due upon the order, if the money is not paid upon the order the plaintiff can have judgment on the note without delivering up or cancelling the order. *Humphreys* v. *Humphreys*, 359.

38. A defendant to an action on a promissory note, given in part payment of a lot of land, cannot resist the payment on the grounds that the title bond of the vendor contains a reservation that the first installment shall be forfeited, and the contract of bargain and sale rescinded, if the remaining notes are not paid when due.
Clarke, for the use of Louisa Co. v. *O'Laughlin*, 375.

39. The vendee cannot disaffirm the contract, if the vendor proceeds to enforce the collection of the notes. He binds himself absolutely by the execution of negotiable notes. *ib.*

40. If a note, which is not negotiable when executed, is afterwards made so by statute, the assignee can then bring suit against the maker, in his own name. *Phillips* v. *Runnels*, 391.

41. The making of such notes negotiable, and allowing the assignee to sue in his own name, instead of suing in the name of the payee for his use, is only a change of remedy, and does not affect the substantial rights of the maker. *ib.*

42. The action of debt lies by the assignee of a promissory note against the maker. *ib.*

43. The assignee may sue in his own right, and may maintain the same kind of action as the payee might have maintained. *ib.*

44. An endorsement in blank, as between a first and second endorser, is tantamount to a special endorsement from the first to the second, and may be so filled up. *Knight* v. *Fox*, 305.

45. If A draws a bill upon B, payable to the order of C, appending the word "agent," without stating for whom he is agent, he is personally liable. *Webb & Thruston* v. *Mauro*, 488.

46. The holder of a note endorsed in blank has a right to sue in the name of the blank endorser for his use.
Gray v. *Phillips & Kennedy*, 430.

47. A note in this form: "Good for $—— out of my grocery," will not entitle the maker to the days of grace. *Lucky* v. *Pepper*, 490.

48. A note or bill of exchange for the payment of money on demand, does not entitle the payee to the days of grace. *ib.*

BILLS OF EXCEPTIONS.

1. A bill of exceptions filed after the writ of error will not be rejected, if it was regularly taken, and there is nothing to show that it was taken and signed subsequent to the date of the writ.
Bennett & Co. v. *Davis*, 364.
2. The bill of exceptions is part of the record from the time it is taken. *ib.*
3. A statement in a bill of exceptions that a certain order is made part of the bill does not make it so. *ib.*
4. Bills of exceptions should show affirmatively that the Court below has committed an error. *ib.*
5. A bill of exceptions signed by bystanders at the trial must state affirmatively the points reserved, and not what they *understood* to be the judge's charge. And it must be drawn up and signed at the time.
Clark v. *Parvin*, 371.
6. A bill of exceptions signed by bystanders will be stricken from the record, unless the record shows that the judge refused to sign it.
Edgar v. *Caldwell*, 434.
7. A summons, or other writ, is no part of the record, unless made so by a bill of exceptions. *Child & Co.* v. *Risk*, 439.
8. Where the bill of exceptions alludes to papers not set out in the record of the case from the District Court, they cannot be considered.
Burkadink v. *Baker*, 442.
9. In order to determine that a case was improperly stricken from the docket in the Court below, the facts upon which the action was founded, as well as the reasons of the Court for sustaining the motion, in order to become part of the record must be made so by bill of exceptions. *O'Sullivan* v. *Brown*, 494.

BLANK.

1. A judgment will be reversed where the name of the garnishee and the damages and costs are left in blank. *Riggleworth* v. *Reed*, 19.

See BILLS OF EXCHANGE, &c., 1, 3, 32, 44, 46.

BONDS.

1. A bond made payable to the United States, and taken by a justice of the peace, from a prisoner arrested for an assault with an intent to kill, conditioned for the defendant's appearance in his Court, and continued at the defendant's instance, to procure testimony in defense, is collectible in an action of debt, in the name of the United States, on proof of the obligor's default.
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2. The sale of an improvement on public lands is a valuable consideration for a promissory note, independent of the statute.
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9. Where A purchases from B, a town commissioner, a lot of land, and pays twenty-five per cent in advance, and gives his note for the balance of the purchase money, if B, by mistake, gives a certificate for a different lot, and the lot which was designed to be sold to A is sold to a different person, upon a suit brought upon A's notes, he will be permitted to show, by parol evidence, the mistake, and that the notes were given without a legal consideration. *Swan, Com'r*, v. *Ewing et al.* 344.

CONSTABLE.

1. If a constable levies on a horse belonging to A and B, for a debt due from A to the plaintiff, he should sell only the share of A. The sale of the whole horse makes the constable a trespasser *ab initio*. *Edgar* v. *Caldwell*, 434.

CONTRACTS.

1. A failure to convey, or an offer to convey, is no bar to the recovery on a negotiable note given in consideration for the purchase of the land. The contracts are independent.
Woods & Hobert v. *J. & W. Morgan*, 179.

2. When A sells to B a tract of land, puts him in possession, takes his notes for the money, and reserves the privilege to affirm or rescind the contract, he cannot bring his writ of right to recover the possession of his lands, without surrendering to B his notes, or showing a readiness to place him *in statu quo*. *Fulwider* v. *Wilford*, 323.

3. A party wishing to set aside a contract must show some useful purpose to be thereby accomplished. *Huff* v. *Jennings et al.* 454.

4. A contract however fraudulent, is not a nullity; it is valid as to all the parties to the fraud, and to all others, except those who are injured thereby. *Webster* v *Reid*, 467.

5. In contracts for the sale of lands, by which one agrees to purchase and the other to convey, the undertakings of the respective parties are always dependent, unless a contrary intimation clearly appears.
Benedict v. *Weston*, 490.

COPY.

1. Error will not lie for a misdescription of a note in the declaration, where the plaintiff has appended a true copy.
Walker & Eno v. *Ayres*, 200.
See also, *Madera et al.* v. *Jones*, 204.
Carothers v. *Green*, 429.

CORONER.

See SHERIFF.

CORPORATION.

See BANK, 1.

COSTS.

1. A person recognized to appear at the District Court to answer, &c. is subject to the costs of the recognizance, although no prosecutor appears. *Houston* v. *United States*, 174.

2. Where the public prosecutor entered a *nolle prosequi* on an indictment for burglary, it was held that the county was liable for the costs of prosecution. *United States* v. *Switzer*, 302.

3. The act of 1840, limiting costs in certain cases for slander, &c. applied to suits commenced previous to the taking effect of that act, if terminated subsequently. *Meigs* v. *Parker*, 378.

4. A jury cannot award costs where the legislature has prescribed the costs incident to the damages assessed. *ib.*
5. The Court may properly award full costs on a judgment for nominal damages in replevin. *Moore* v. *Ross*, 401.
6. The statute declaring that no more costs than damages shall be recovered, is complied with by including the value of the property replevied. *ib.*
7. Under the act of the legislature rendering private prosecutors liable for costs, there must be a trial and acquittal to render the prosecutor liable. And the Court must be satisfied that the prosecution was malicious. *Margrave* v. *United States*, 452.

COVENANT.

1. In an action of covenant, illegality of consideration cannot be given in evidence under the general issue, but must be specially pleaded. *Stannard et al.* v. *M'Carty*, 124.
2. If either vendor or vendee wishes to compel the other to fulfill his contract, he must make his part of the agreement precedent. *Benedict* v. *Weston*, 490.

DAMAGES.

1. It does not appear to be imperative on the Court to refer the assessment of damages to the clerk. At all events, as it is a matter of mere calculation, unless some error of computation is shown, the judgment will not on that account be reversed. *Davis* v. *Morford et al.* 99.

DATE.

1. An omission of the name of the month, in the date of the service of a writ, is not material where there is sufficient in the circumstances of the case to show due service. *Wilson* v. *King*, 106.
2. Between the parties to an instrument the date raises a legal presumption of the time of its execution. *Meldrum* v. *Clark*, 130.
3. Where an instrument, executed by a third person to the defendant, is brought in to defeat the plaintiff's action, and the time of its execution becomes a material fact in the case, the mere date is no evidence of that time. *ib.*

DAYS OF GRACE.

1. The *lex mercatoria*, allowing three days of grace on notes, bills, &c. is in force here, until a contrary custom be established. *Hudson* v. *R. & O. Matthews*, 94.

See BILLS OF EXCHANGE, &c. 47, 48.

DEADLY WEAPONS.

1. If in an indictment it be charged that an assault was made with an *axe*, the inference is that it was a "*deadly weapon.*"
Dollarhide v. *United States*, 233.

DEBT.

1. Where the action is debt, and the form of the judgment is as though it had been assumpsit, it is no fatal error. *Davis* v. *Morford*, 99.

DECLARATION.

See PLEADING.

DECREE.

See EQUITY.

DEFAULT.

1. The Supreme Court will not enquire into the regularity of a default in the Court below, unless the record shows it to have been contrary to the rules of that Court. *Porter & Brazelton* v. *Moffett*, 108.
2. If a copy of a summons is left at a house which is not the defendant's residence, and a judgment be taken against him by default, he must either set aside the default by an affidavit of merits and such other showing as the law requires, or he must seek his remedy in a Court of equity. *Lucas* v. *Waller*, 303.
3. A judgment by default must be taken before a jury can be impannelled to assess the damages.
Romaine v. *Commissioners Muscatine*, 357.
4. If it appears negatively by the record that the defendant was not called on a default, or that there was no proof of the endorsement of the note, it is not ground of reversal. *Mattoon* v. *Vanater*, 492.

DELIVERY BOND.

See BREACH.

DEMAND.

1. Where payment is to be made in something besides money, the institution of a suit (which is a legal demand for *money only*) is premature, unless preceded by a demand for the payment provided for by the contract. And until such demand be first shown, the defendant is not bound to prove anything in defense.
Wyatt v. *Bailey*, 396.

See BILLS OF EXCHANGE.

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See PLEADING, 2, 3, 8, 9.

DEPOSITIONS.

1. Where depositions improperly taken are ruled out on the trial, they cannot be assigned for error. *Phillips* v. *Runnels*, 391.

DISCONTINUANCE.

1. Where a defendant in the Court below neglects for several terms to move to have a case which has been remanded for a new trial docketed and disposed of, he will not be permitted to regard the cause as discontinued, and to have it stricken from the docket at the first term the plaintiff has replaced it there.

Long v. *Long*, *for use*, *&c.* 458.

DISTRICT COURTS.

1. The District Courts of the territory were not the District Courts of the *United States*, properly speaking, but territorial Courts, having the powers of the United States District Courts.

Lorimier et al. v. *Bank of Illinois*, 223.

DUBUQUE.

1. The decision of the town commissioners of Dubuque in the adjudication of pre-emptive claims is not final and conclusive, nor subject alone to the revision of the commissioners of the general land office. Should their decisions have been obtained by fraud or mistake, relief could be had in chancery. *Farber et al.* v. *Levi*, 372.

See BANK; FERRIES.

EMANCIPATION.

See SLAVE, 1.

EQUITY.

1. A Court of equity will relieve where, by the practices and management of the plaintiff, the defendant has been induced to suffer a default in an action at law. *Porter & Brazelton* v. *Moffett*, 108
2. Where a bill is filed for an injunction and relief, and that part of the bill which sets forth the facts that would justify an interference was not sworn to, although the injunction would be dissolved, the bill should not be dismissed. *ib.*

. This Court will not enquire into the irregularity of a default in the District Court, unless the record shows it to have been contrary to the rules of that Court. *ib.*

4. A Court of equity will not enjoin the collection of money on a judgment at law, where the defendant there has neglected to make a defense, which should have been as available at law as in equity.
Faulkner v. *Campbell*, 148.
Same point, in *Miller & Faulkner* v. *M'Guire*, 150.

5. Where the bill alleges new and material testimony, discovered after the trial at law, the substance of that testimony should be set out. *ib.*

6. Where there is a dissolution of the injunction, and a demurrer to the bill sustained, the sustaining of the demurrer should not have the effect of dismissing the bill where it contains equity, although it may not be sworn to. *Porter & Brazelton* v. *Moffett*, 153.

7. It is not proper to quash a *ne exeat*, to dissolve the injunction and dismiss the bill, &c. where the equitable matter is not ripe for the action of the Court. *Fitch* v. *Richardson*, 245.

8. The filing of an answer is the basis of a motion to set aside a *ne exeat*, and no affidavit is necessary to predicate a motion for that purpose. *ib.*

9. An agreement between A and B that A is to execute a mortgage to B (as soon as he pays for and obtains a title for a lot), to secure the payment of a debt due to B, is not to be treated as a mortgage.
Humphreys v. *Snyder*, 263.

10. A bill filed by an elder of a church in his own name and right as an elder, to secure the title to a church lot, granted to the church of which he is a member, will not be entertained.
M'Connell v. *Gardner*, 272.

11. The petition should be filed in the name of the church; and in the absence of an incorporation it should set forth the names of all the members of the association. *ib.*

12. Where A has a pre-emptive right to a lot of land belonging to the United States, sells the same to B, and takes a mortgage to secure the payment of the consideration money, if B afterwards purchases the same lands from the United States at public auction, and thus prevents A from obtaining the fee simple title, with power to fulfill his engagement, he (B) cannot set up his title from the United States, in bar to the foreclosure of the mortgage.
Marshall & Whitesides v. *Bush*, 275.

13. The title which the mortgagee obtains enures to the benefit of the mortgager. *ib.*

14. A mere verbal promise of A to borrow money and purchase lands of the United States in the name of B, does not constitute an agency, and cannot be the basis of a decree for the conveyance of the lands (so purchased) by A to B, upon a bill filed for that purpose.
Cravens v. *Cravens*, 285.

48. A note or bill of exchange for the payment of money on demand, does not entitle the payee to the days of grace. *ib.*

BILLS OF EXCEPTIONS.

1. A bill of exceptions filed after the writ of error will not be rejected, if it was regularly taken, and there is nothing to show that it was taken and signed subsequent to the date of the writ.
Bennett & Co. v. *Davis*, 364.
2. The bill of exceptions is part of the record from the time it is taken. *ib.*
3. A statement in a bill of exceptions that a certain order is made part of the bill does not make it so. *ib.*
4. Bills of exceptions should show affirmatively that the Court below has committed an error. *ib.*
5. A bill of exceptions signed by bystanders at the trial must state affirmatively the points reserved, and not what they *understood* to be the judge's charge. And it must be drawn up and signed at the time.
Clark v. *Parvin*, 371.
6. A bill of exceptions signed by bystanders will be stricken from the record, unless the record shows that the judge refused to sign it.
Edgar v. *Caldwell*, 434.
7. A summons, or other writ, is no part of the record, unless made so by a bill of exceptions. *Child & Co.* v. *Risk*, 439.
8. Where the bill of exceptions alludes to papers not set out in the record of the case from the District Court, they cannot be considered.
Burkadink v. *Baker*, 442.
9. In order to determine that a case was improperly stricken from the docket in the Court below, the facts upon which the action was founded, as well as the reasons of the Court for sustaining the motion, in order to become part of the record must be made so by bill of exceptions. *O'Sullivan* v. *Brown*, 494.

BLANK.

1. A judgment will be reversed where the name of the garnishee and the damages and costs are left in blank. *Riggleworth* v. *Reed*, 19.

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7. In an action of covenant, illegality of consideration cannot be given in evidence under the general issue, but must be specially pleaded. *Stannard et al.* v. *M'Carty*, 124.
8. Where a person obtains all that he bargained for, in the absence of all fraud or illegality in the transaction, and receives the benefit designed to be transferred, he cannot set up against the vendor a want or failure of consideration. *Wilson* v. *Webster*, 312.
9. Where A purchases from B, a town commissioner, a lot of land, and pays twenty-five per cent in advance, and gives his note for the balance of the purchase money, if B, by mistake, gives a certificate for a different lot, and the lot which was designed to be sold to A is sold to a different person, upon a suit brought upon A's notes, he will be permitted to show, by parol evidence, the mistake, and that the notes were given without a legal consideration. *Swan, Com'r*, v. *Ewing et al.* 344.

CONSTABLE.

1. If a constable levies on a horse belonging to A and B, for a debt due from A to the plaintiff, he should sell only the share of A. The sale of the whole horse makes the constable a trespasser *ab initio*. *Edgar* v. *Caldwell*, 434.

CONTRACTS.

1. A failure to convey, or an offer to convey, is no bar to the recovery on a negotiable note given in consideration for the purchase of the land. The contracts are independent.
Woods & Hobert v. *J. & W. Morgan*, 179.

2. When A sells to B a tract of land, puts him in possession, takes his notes for the money, and reserves the privilege to affirm or rescind the contract, he cannot bring his writ of right to recover the possession of his lands, without surrendering to B his notes, or showing a readiness to place him *in statu quo*. *Fulwider* v. *Wilford*, 323.

3. A party wishing to set aside a contract must show some useful purpose to be thereby accomplished. *Huff* v. *Jennings et al.* 454.

4. A contract however fraudulent, is not a nullity; it is valid as to all the parties to the fraud, and to all others, except those who are injured thereby. *Webster* v. *Reid*, 467.

5. In contracts for the sale of lands, by which one agrees to purchase and the other to convey, the undertakings of the respective parties are always dependent, unless a contrary intimation clearly appears.
Benedict v. *Weston*, 490.

COPY.

1. Error will not lie for a misdescription of a note in the declaration, where the plaintiff has appended a true copy.
Walker & Eno v. *Ayres*, 200.
See also, *Madera et al.* v. *Jones*, 204.
Carothers v. *Green*, 429.

CORONER.

See SHERIFF.

CORPORATION.

See BANK, 1.

COSTS.

1. A person recognized to appear at the District Court to answer, &c. is subject to the costs of the recognizance, although no prosecutor appears. *Houston* v. *United States*, 174.

2. Where the public prosecutor entered a *nolle prosequi* on an indictment for burglary, it was held that the county was liable for the costs of prosecution. *United States* v. *Switzer*, 302.

3. The act of 1840, limiting costs in certain cases for slander, &c. applied to suits commenced previous to the taking effect of that act, if terminated subsequently. *Meigs* v. *Parker*, 378.

4. A jury cannot award costs where the legislature has prescribed the costs incident to the damages assessed. *ib.*
5. The Court may properly award full costs on a judgment for nominal damages in replevin. *Moore* v. *Ross*, 401.
6. The statute declaring that no more costs than damages shall be recovered, is complied with by including the value of the property replevied. *ib.*
7. Under the act of the legislature rendering private prosecutors liable for costs, there must be a trial and acquittal to render the prosecutor liable. And the Court must be satisfied that the prosecution was malicious. *Margrave* v. *United States*, 452.

COVENANT.

1. In an action of covenant, illegality of consideration cannot be given in evidence under the general issue, but must be specially pleaded. *Stannard et al.* v. *M'Carty*, 124.
2. If either vendor or vendee wishes to compel the other to fulfill his contract, he must make his part of the agreement precedent. *Benedict* v. *Weston*, 490.

DAMAGES.

1. It does not appear to be imperative on the Court to refer the assessment of damages to the clerk. At all events, as it is a matter of mere calculation, unless some error of computation is shown, the judgment will not on that account be reversed. *Davis* v. *Morford et al.* 99.

DATE.

1. An omission of the name of the month, in the date of the service of a writ, is not material where there is sufficient in the circumstances of the case to show due service. *Wilson* v. *King*, 106.
2. Between the parties to an instrument the date raises a legal presumption of the time of its execution. *Meldrum* v. *Clark*, 130.
3. Where an instrument, executed by a third person to the defendant, is brought in to defeat the plaintiff's action, and the time of its execution becomes a material fact in the case, the mere date is no evidence of that time. *ib.*

DAYS OF GRACE.

1. The *lex mercatoria*, allowing three days of grace on notes, bills, &c. is in force here, until a contrary custom be established. *Hudson* v. *R. & O. Matthews*, 94.

See BILLS OF EXCHANGE, &c. 47, 48.

DEADLY WEAPONS.

1. If in an indictment it be charged that an assault was made with an *axe*, the inference is that it was a "*deadly weapon.*"
Dollarhide v. *United States*, 233.

DEBT.

1. Where the action is debt, and the form of the judgment is as though it had been assumpsit, it is no fatal error. *Davis* v. *Morford*, 99.

DECLARATION.

See PLEADING.

DECREE.

See EQUITY.

DEFAULT.

1. The Supreme Court will not enquire into the regularity of a default in the Court below, unless the record shows it to have been contrary to the rules of that Court. *Porter & Brazelton* v. *Moffett*, 108.
2. If a copy of a summons is left at a house which is not the defendant's residence, and a judgment be taken against him by default, he must either set aside the default by an affidavit of merits and such other showing as the law requires, or he must seek his remedy in a Court of equity. *Lucas* v. *Waller*, 303.
3. A judgment by default must be taken before a jury can be impannelled to assess the damages.
Romaine v. *Commissioners Muscatine*, 357.
4. If it appears negatively by the record that the defendant was not called on a default, or that there was no proof of the endorsement of the note, it is not ground of reversal. *Mattoon* v. *Vanater*, 492.

DELIVERY BOND.

See BREACH.

DEMAND.

1. Where payment is to be made in something besides money, the institution of a suit (which is a legal demand for *money only*) is premature, unless preceded by a demand for the payment provided for by the contract. And until such demand be first shown, the defendant is not bound to prove anything in defense.
Wyatt v. *Bailey*, 396.

See BILLS OF EXCHANGE.

DEMURRER.

See PLEADING, 2, 3, 8, 9.

DEPOSITIONS.

1. Where depositions improperly taken are ruled out on the trial, they cannot be assigned for error. *Phillips* v. *Runnels*, 391.

DISCONTINUANCE.

1. Where a defendant in the Court below neglects for several terms to move to have a case which has been remanded for a new trial docketed and disposed of, he will not be permitted to regard the cause as discontinued, and to have it stricken from the docket at the first term the plaintiff has replaced it there.

Long v. *Long, for use, &c.* 458.

DISTRICT COURTS.

1. The District Courts of the territory were not the District Courts of the *United States*, properly speaking, but territorial Courts, having the powers of the United States District Courts.

Lorimier et al. v. *Bank of Illinois*, 223.

DUBUQUE.

1. The decision of the town commissioners of Dubuque in the adjudication of pre-emptive claims is not final and conclusive, nor subject alone to the revision of the commissioners of the general land office. Should their decisions have been obtained by fraud or mistake, relief could be had in chancery. *Farber et al.* v. *Levi*, 372.

See BANK; FERRIES.

EMANCIPATION.

See SLAVE, 1.

EQUITY.

1. A Court of equity will relieve where, by the practices and management of the plaintiff, the defendant has been induced to suffer a default in an action at law. *Porter & Brazelton* v. *Moffett*, 108

2. Where a bill is filed for an injunction and relief, and that part of the bill which sets forth the facts that would justify an interference was not sworn to, although the injunction would be dissolved, the bill should not be dismissed. *ib.*

3. This Court will not enquire into the irregularity of a default in the District Court, unless the record shows it to have been contrary to the rules of that Court. *ib.*

4. A Court of equity will not enjoin the collection of money on a judgment at law, where the defendant there has neglected to make a defense, which should have been as available at law as in equity.
Faulkner v. *Campbell*, 148.
Same point, in *Miller & Faulkner* v. *M'Guire*, 150.

5. Where the bill alleges new and material testimony, discovered after the trial at law, the substance of that testimony should be set out. *ib.*

6. Where there is a dissolution of the injunction, and a demurrer to the bill sustained, the sustaining of the demurrer should not have the effect of dismissing the bill where it contains equity, although it may not be sworn to. *Porter & Brazelton* v. *Moffett*, 153.

7. It is not proper to quash a *ne exeat*, to dissolve the injunction and dismiss the bill, &c. where the equitable matter is not ripe for the action of the Court. *Fitch* v. *Richardson*, 245.

8. The filing of an answer is the basis of a motion to set aside a *ne exeat*, and no affidavit is necessary to predicate a motion for that purpose. *ib.*

9. An agreement between A and B that A is to execute a mortgage to B (as soon as he pays for and obtains a title for a lot), to secure the payment of a debt due to B, is not to be treated as a mortgage.
Humphreys v. *Snyder*, 263.

10. A bill filed by an elder of a church in his own name and right as an elder, to secure the title to a church lot, granted to the church of which he is a member, will not be entertained.
M'Connell v. *Gardner*, 272.

11. The petition should be filed in the name of the church; and in the absence of an incorporation it should set forth the names of all the members of the association. *ib.*

12. Where A has a pre-emptive right to a lot of land belonging to the United States, sells the same to B, and takes a mortgage to secure the payment of the consideration money, if B afterwards purchases the same lands from the United States at public auction, and thus prevents A from obtaining the fee simple title, with power to fulfill his engagement, he (B) cannot set up his title from the United States, in bar to the foreclosure of the mortgage.
Marshall & Whitesides v. *Bush*, 275.

13. The title which the mortgagee obtains enures to the benefit of the mortgager. *ib.*

14. A mere verbal promise of A to borrow money and purchase lands of the United States in the name of B, does not constitute an agency, and cannot be the basis of a decree for the conveyance of the lands (so purchased) by A to B, upon a bill filed for that purpose.
Cravens v. *Cravens*, 285.

15. If A mortgages a tract of land to B, while the title to the same is in the United States, and afterwards C purchases the same land from the United States, conveys it to A, who again mortgages the land to D, the title thus thrown upon A enures to the benefit of B, the first mortgagee, who will be preferred to D, the second mortgagee, who was a purchaser with notice of an outstanding mortgage of record.
Warburton v. *Mattox*, 367.

16. Where a co-partner in the right of pre-emption to a lot of land neglects or refuses to join his co-partner in presenting their claim before the board of commissioners for allowance, the heirs of the negligent and refusing partner cannot come into a Court of equity against the suriving partner for a division of the lot, which he has secured to himself. *Farber et al.* v. *Levi*, 372.

17. If A and B promise to enter land for C, and A enters the land in his own name, although B should have advanced half the purchase money to A, if A tenders to B his money, and executes his trust by a conveyance to C, then B cannot have a decree against A for half the land. *Key* v. *Isett et al.* 388.

18. Where the condition of a title bond is, that the deed is to be made, provided that the money is paid by a particular day, and the money is not paid, the bargainee cannot file his bill for a specific performance Time is the essence of such a contract.
Shuffleton & Pitzer v. *Jenkins*, 427.

19. Where there is a demurrer of one of several defendants in chancery, for the want of equity, and going to the merits of the whole bill and undisposed of, a final decree cannot be entered np against the others who are in default for the want of a plea, answer, or demurrer.
Jenkins v. *M'Cully*, 447.

20. On a bill for specific performance, a tender of the purchase money must be made to the vendor, before the complainant can legally require the conveyance of the land so purchased.
Huff v. *Jennings et al.* 454.

21. Where A sold to B a lot of land for $675.00, and three hundred dollars were paid down and notes given for the remainder by B; and the vendor, executing a bond to convey upon the payment of the last note, and before the note fell due B sold the lots and assigned the title bond to C, who knew of A's lien for the balance of the purchase money: Upon a bill filed by A against B and C, held that his lien against C should be enforced. *Young & Snyder* v. *Isett*, 460.

22. An injunction will not lie to prevent the commission of a simple act of trespass, the party injured having an adequate remedy at law.
Wilson v. *Hughell*, 461.

23. Where A, the complainant, purchased of B a land claim, for which he was to pay $600, and did pay near $500 down, and gave his notes for the balance, and A being absent when the land was brought into market, B borrowed the money of C with which to enter the

same, and afterwards sold it to D, an innocent purchaser, without notice: held that the title to D could not be disturbed, but that A was entitled to a decree against B for the $600, with interest.
Cunningham v. *Depew et al.* 463.

24. The bill was demurred to because the defendant is described as A. G. Smith. If this was an erroneous description, the defendant should have pleaded in abatement, and given his true name, *Albert G. Smith.* *Smith* v. *Barrett*, 492.

ERROR.

1. A writ of error will only lie where there has been a final judgment in the Court below. *Wallis* v. *Sparks*, 20.
2. Where judgment has been arrested, if the plaintiff feels thereby aggrieved, and wishes to test the decision of the Court thereon, he may move for judgment against himself, which will be ordered, as a matter of course, upon which he may bring his writ of error. *ib.*
3. An erroneous instruction of the Court below, on a point immaterial to the issue, will not be sufficient to disturb the judgment.
Stannard et al. v. *M'Carty*, 124.
4. A failure to enter a *similiter* to the defendant's plea, is not an error for which a reversal can be asked.
Woods & Hobert v. *Morgan*, 179.
5. Where a writ of error was sued out before the law required a writ of error bond to operate as a supersedeas, a change of the law would not operate upon the case so as to allow of a dismissal of the writ. Nor would a change of the time of suing out the writ operate upon a case already in Court. *Battelle* v. *Bridgman & Co.* 363.
6. The plaintiff in error must not only show error, but he must show those errors which have done him substantial injury, before he can ask for a reversal of the judgment below.
Johnson et al. v. *United States*, 423.
7. The Supreme Court has no power to examine into errors in fact occurring in the Court below and not appearing on record.
Brazelton v. *Jenkins*, 15.
8. The territorial act for preventing writs of error from being brought after the expiration of a year, applied as well to criminal as civil cases. *Fike* v. *United States*, 30.
9. After argument it is too late to raise the objection that the errors have not been assigned by rule day. *M'Kell* v. *Neil and wife*, 271.
10. A writ of error, where a proper bond is filed, operates as a supersedeas on the judgment below. *Burge* v. *Burns & Snyder*, 287.
11. A writ of error is a writ of right, and lies from a judgment by confession. *ib.*
12. The Court is only bound to decide questions raised, and the neglect of a party complaining is never an available ground of error.
Coutch & Kinsman v. *Barton*, 354.

13. A joinder in error has the same effect on a motion to dismiss as the filing of a plea in the Court below; it waives all irregularity in the mode by which the defendant in error has been brought into Court.
Romaine v. *Com's of Muscatine*, 357.

14. The writ of error only brings up the errors existing at the time of its date. *Bennett & Co.* v. *Davis*, 364.

15. The excepting party must make out an affirmative case of error, and such as works substantial injustice.
Fanning v. *McCraney*, 398.

16. If the record of the proceedings is not shown affirmatively to be irregular, the judgment below will be affirmed.
Peck v. *Ayres*, 493.

EVIDENCE.

1. The endorser, when not interested, is competent to prove facts arising after the execution of the note, but not to prove as to the original liability of the maker. *Strang* v. *Wilson*, 84.

2. The statute which exempts the plaintiff from the necessity of proving the signature of a note, &c. unless denied under oath, does not extend to the endorsement. That must be proved.
Hardman v. *Chamberlin*, 104.

3. It is well understood that parol proof is admissible to sustain the defense of fraud, or illegality in a contract, though under seal.
Stannard et al. v. *M'Carty*, 124.

4. A private prosecutor on an indictment for larceny is not an incompetent witness, although the money alleged to have been stolen belonged to the prosecuting witness, and, upon a conviction of the thief, would be entitled to recover from the convict double the amount stolen, and would be liable for the costs if the accused should be acquitted. *United States* v. *Everest*, 206.
(Dissenting opinion of Judge Mason, 209 to 214.)

See ACCOUNT, 2, 3; ADVICE, 1; ARBITRATION, 1; AGENT, 1; BILLS OF EXCHANGE, 17; COMMON COUNTS, 3; CONFESSION, 1; CONSIDERATION, 9; HANDWRITING; NEW TRIAL; TRESPASS; SLANDER, WITNESS.

EXCLUSIVE PRIVILEGES.

1. The legislature may grant to individuals exclusive privileges within reasonable limits, when done in good faith, as for ferries, &c.
United States ex rel. Jones v. *Fanning*, 348.

EXECUTION.

1. The statute which subjects to execution government lands sold but not patented, is not contrary to the organic law.
Levi v. *Thompson*, 235.

See CONSTABLE, 1.

EXECUTORS.

See ADMINISTRATORS.

FALSE IMPRISONMENT.

1. In an indictment for false imprisonment, the charge that the defendant was "unlawfully and feloniously imprisoned," implies that the act was done without sufficient legal authority.
United States v. *Lapoint*, 146.

FALSE PRETENCES.

1. The district attorney, on an indictment for obtaining property under false pretences, is not required to file specifications of the false pretences used by the person accused. *United States* v. *Ross*, 164.

FEES.

See MARSHAL.

FERRIES.

1. The Mississippi, so far as it presents an obstruction to land carriage, is left to the sound discretion of the legislature to provide means for surmounting such obstructions by means of ferries.
United States ex rel. Jones v. *Fanning*, 348.

See EXCLUSIVE PRIVILEGES.

FINE.

1. On an indictment for permitting gaming in a grocery, if the jury find a verdict of guilty, and fix the fine, it is not erroneous for the Court to impose it, if it does not exceed the lowest amount which is imposed by law for the offense, as the defendant cannot be prejudiced by such judgment. *Simmons* v. *United States*, 490.

FIRM.

1. The statute dispensing with the necessity of proving the names of the individuals composing a firm, took effect in cases previously commenced, if tried afterwards. *Ballard* v. *Ridgley & Billon*, 27.
2. Where a person becomes indebted to a partnership as a firm, they may sue him by their partnership name and style.
Johnson & Co. v. *Smith*, 105.
3. In suits brought upon any instrument of writing, made payable to a firm name, it is only necessary to set out and prove the partnership name. *Bernards* v. *Parvin*, 307.

FORCIBLE ENTRY AND DETAINER.

1. The action of forcible entry and detainer is not the proper action for trying titles of any description; the facts of actual possession by the complainant, and forcible entry, or detainer, or both, by the defendant, are sufficient to determine the verdict.

Settle v. *Henson*, 111.

2. Holding over willfully, and with force, contrary to the terms of a lease, subjects the offender to this action. But in that case the title cannot come in question, for the tenant is not permitted to dispute the title of his landlord. *ib.*

3. The first class of cases are in the nature of penal actions, and can only be instituted by him whose possession has been disturbed, and not by his assignee. *ib.*

4. In an action of forcible entry and detainer, it matters not that the plaintiffs themselves were trespassers. A trespasser may maintain, under certain circumstances, this action against the legal owner.

Lorimier & Walker v. *Lewis et al.* 253.

FORECLOSURE.

See MORTGAGE.

FORMER RECOVERY.

1. A transcript from a justice of the peace showing a conviction of A B for an assault and battery is not admissible in bar to a prosecution by indictment for a riot, although alleged to be the same breach of the peace for which the prisoner was indicted with others for a riot. A riot is a distinct and different offense.

Scott et al. v. *United States*, 142.

2. A verbal agreement between the plaintiff and defendant on a trial before a justice of the peace that a verdict in his Court should be final, may, if broken, be the grounds of an action, but cannot be pleaded in bar to the action, when removed to the District Court by appeal. *Clark* v. *Gibson*, 328.

3. A record for a recovery in an action of forcible entry and detainer, for a portion of land, &c. is not admissible in bar to an action of trespass committed on another portion of it by the defendant.

McDonald et al. v. *Lightfoot*, 450.

FRAUD.

1. The statutory provision declaring that fraud may be set up against a note in the hands of an innocent assignee, does not apply to a note assigned before the statute took effect. *Temple* v. *Hays*, 9.

2. Such defense is not available in the absence of statutes on that subject. *ib.*

3. Merely selling lands belonging to the United States, where no deception is practiced, is not a fraud upon the purchaser.
Stannard et al. v. *McCarty*, 124.
4. It is well settled that parol proof is admissible to sustain the defense of fraud, or illegality in a contract, though under seal. *ib.*
5. A party to a judgment cannot collaterally impeach it for fraud; much less can a stranger be permitted to do it. *Webster* v. *Reid*, 467.
6. A contract, however fraudulent, is not a nullity; it is valid to all the prrties to the fraud, and to all others except those who are injured thereby. *ib.*
7. A general plea of fraud in an action of assumpsit on a note, &c. is good. *Hampton* v. *Pearce*, 489.
8. An affidavit to obtain an attachment must state that so much is due, and that affiant believes that the defendant is about to remove or dispose of his property with intent to defraud his creditors.
Chaney v. *Ostrander*, 493.

FRAUDS AND PERJURIES.

1. A parol contract for the sale of improvements upon public lands is valid, and is not such an interest in lands as the statute of frauds and perjuries contemplates. *Zickafosse* v. *Hulick*, 175.
2. A rented a house to B and he underlet to C, and he left indebted to B, while B was indebted to A for the rent. B sued out an attachment against C, which was placed in the hands of D, a constable. The property attached was sold by order of a justice of the peace. Before the sale it was agreed between A, B, and C that C should pay to A his debt, and A discharged B of his liability; D sold the goods and received the money, which he paid to the justice of the peace, previous to the judgment rendered in favor of B. A demanded the money of D, which he refused to pay over, it being in the hands of the justice of the peace. An attachment was sued out from another justice of the peace, and the first justice of the peace garnisheed, &c. A sued D, the constable: held that he could not recover, and that the promise not being in writing was within the statute of frauds.
Chadwick v. *Brown*, 492.

GAMING.

1. An indictment for betting on a horse-race cannot be sustained under the act against gaming. Horse-racing is not a game of chance.
Harless & Adams v. *United States*, 169.

See FINE, 1.

GARNISHEE.

1. Money paid on a negotiable note by the maker before it becomes due is paid at his peril, whether he pays the same as garnishee or otherwise. *Commissioners of Jefferson* v. *Fox et al.* 48.

2. The maker is not liable on a garnishee process, unless the debt is due, and the note shown to be in the possession of the defendant in the suit. *ib.*

See BLANK, 1.

GRAND JURORS.

1. A residence of six months in the territory entitles a person to set as a grand juror, although he may have resided a portion of that time in the Indian territory. *Harless & Adams* v. *United States*, 169.
2. If the county commissioners fail to certify the list of grand jurors chosen, as prescribed by law, the illegality of the pannel may be assigned for error. *United States* v. *Cropper*, 190.

See JURY.

GROCERY.

1. A license to keep a grocery is not assignable.
Lewis v. *United States*, 199.

GUARDIAN.

See ADMINISTRATORS, 1.

GUARANTY.

1. A general guaranty that it shall not be necessary to demand payment and give notice on bills or notes endorsed by the guarantor, is in force until shown by him to be rescinded. *Knight* v. *Fox*, 305.

HABEAS CORPUS.

1. A prisoner under an indictment for murder cannot, as a matter of right, claim to be admitted to bail on *habeas corpus*.
Hight v. *United States*, 407.

See SLAVE, 1; INDICTMENT, 4.

HALF-BREED, SAC AND FOX INDIANS.

1. The treaty of 1824 with the Sac and Fox tribes of Indians, by which certain lands were ceded to the United States, did not include that portion of their lands lying between the rivers Des Moines and Mississippi, which was reserved for the half-breeds belonging to said tribes. *Webster* v. *Reid*, 467.
2. By this treaty of 1824, the half-breeds had conferred upon them the right of private property in the lands reserved for their use, and not the sovereignty over them. *ib.*

3. The title of the half-breeds was not disturbed by the second treaty and cession in 1832, as the cession of lands from one nation to another does not effect the right of private property. *ib.*

See CONGRESS, 1, 5, 6.

HANDWRITING.

1. Where a witness has received letters purporting to be from A B, and has answered one of them, but has received no reply, he cannot, with no other knowledge of the writing of A B, be a competent witness to prove it, or his signature to a power of attorney.
Webb & Thruston v. *Mauro*, 329.

INCEST.

1. A brother and sister must each be over the age of sixteen years to incur the guilt of incest. *United States* v. *Hiler*, 330.

INDICTMENT.

1. On an indictment against "Donald," verdict and judgment cannot be rendered against "Donnel," although the names may have nearly the same sound. *Donnel* v. *United States*, 141.
2. In an indictment for false imprisonment, the charge that the defendant was "unlawfully and feloniously imprisoned," implies that the act was done without sufficient legal authority, and it is good without the latter allegation. *United States* v. *Lapoint*, 146.
3. An indictment furnishes no presumption of guilt against a prisoner when he is upon his trial, but so far as it regards all intermediate proceedings between the indictment and trial, it furnishes the very strongest possible presumption of guilt.
Geo. W. & G. V. Hight v. *United States*, 407.
4. The provisions of our *habeas corpus* act, so far as they require the hearing of original testimony, contemplate cases where no indictment has been found. *ib.*
5. The finding of the grand jury is conclusive, so far as to control all proceedings up to the time of trial before the petit jury. *ib.*
6. An informal caption to an indictment is not ground of error, if the description cannot be mistaken. *Hampton* v. *United States*, 489.
7. The words, "in and upon one A B, then and there being, unlawfully did make an assault," sufficiently refers to the county in the margin as the place where the offense was committed. *ib.*

See FALSE PRETENCES; HORSE-RACING; DEADLY WEAPON; PERJURY.

ENDORSEMENT.

See BILLS OF EXCHANGE, &c. 27, 28, 44, 46.

ENDORSEE.

See ASSIGNEE.

INFANCY.

1. Where a note was executed in Illinois, by a minor, who set up the defense of infancy on the trial, it is not necessary for him to prove that, by the laws of Illinois, minors are not liable on their general contracts. *Holmes, Brown & Co.* v. *Mallett*, 82.

See BILLS OF EXCHANGE, &c. 36.

INJUNCTION.

1. The issuing of an injunction, which operates as a release of errors in a judgment at law, does not so operate where it is designed to enjoin proceedings in violation of law. *Burge & Burns* v. *Snyder*, 287.
2. If a suit at law should be brought by A for the use of B, against C, during the absence of A, and without authority from B, and judgment had, C would have equitable grounds to enjoin the judgment. *Roberts* v. *Smith & Halferty*, 426.

See EQUITY, 2, 4, 5, 6, 7, 22.

INNKEEPER.

1. A person who occasionally entertains travelers for pay is not an Innkeeper within the meaning of the law, and if property is entrusted to his care by his guests, and it be lost, he is not responsible, as is a common Innkeeper. *Lyon* v. *Smith*, 184.

INSOLVENT DEBTOR.

1. An insolvent debtor, in making an assignment for the benefit of his creditors, is not bound to make a pro rata or equitable division; but may select from amongst them those whom he will pay, to the exclusion of others. *Pitriken, assignee in bankruptcy of Bissell* v. *Davis*, 296.
2. An insolvent debtor cannot revoke the deed of assignment after the assignee has notified a portion of the creditors under it, or where any of the trust powers have been executed. *ib.*
3. It is not a departure from the trust to sell the effects of the insolvent upon credit, under a general direction to dispose of the effects, &c. *ib.*

INTEREST.

1. It is no material variance that where the instrument stipulates for twelve per cent interest, the declaration makes no mention of interest at all. *Wilson* v. *King*, 106.

2. Where a note stipulates for twelve per cent interest, the judgment should draw interest at the same rate. *ib.*
3. Where a note is payable at a given time, "with ten per cent interest if not paid when due," the interest is properly computable from the date of the note. *Parvin* v. *Hoopes*, 294.
4. A note payable two years after date, "to bear interest at fifty per cent from due until paid," is not usurious. *Wight* v. *Shuck*, 425.

ISSUE.

1. Where an issue is made up in the District Court in a cause brought up from a justice of the peace, but it does not appear what that issue was, it will be presumed that the issue was such as to try the real merits of the case. *Levi* v. *M'Craney*, 91.
2. Judgment cannot be rendered upon an immaterial issue. *Hughes* v. *M'Cutchen*, 154.

See COVENANT, 1.

JUDGMENT.

1. Where judgment is given by default on a note for the payment of money only, the Court may direct the clerk to compute the interest and assess the damages by virtue of the 13th section of the practice act. *Parvin* v. *Hoopes*, 294.
2. Where the parties in an action of assumpsit waive a trial by jury and submit the whole matter to the Court, no formal entry of a finding on the issues, as on a verdict of a jury, is necessary. The amount of damages found is within its own knowledge, and it is sufficient to enter up judgment for the amount of damages assessed. *Smith* v. *Smith & Johnson*, 300.
3. Judgment may be entered against one only of two defendants in an action of right. *Wilford* v. *Miller*, 405.
4. A judgment for a greater amount than that contained in the bill of particulars is erroneous; but may be cured by a *remittitur*. *Roberts* v. *Smith & Halferty*, 417.
5. Judgment may be rendered without any finding for the plaintiff by the Court upon the issue joined. Where the whole matter is submitted to the Court, there seems no necessity of making a formal report from itself to itself. *Gray* v. *Phillips, for use, &c.* 430.
6. Where a judgment was rendered *nunc pro tunc* on a motion for a new trial, which had been taken under advisement, bearing date at a time when the Court was not in session, it was properly regarded as a nullity; and the Court, when regularly in session subsequently, was authorized to enter up judgment upon the verdict previously rendered, without regard to a writ of error which had been sued out upon the first illegal and void judgment. *Shepperd et al.* v. *Wilson*, 448.

7. Judgments rendered under an unconstitutional law are not nullities; and a sheriff levying and selling under such a judgment would not be a trespasser. *Webster* v. *Reid*, 467.
8. A general judgment at law is so far conclusive as not to be disturbed by another judgment at law. *ib.*

See ERROR, 1, 2, 3; ATTACHMENT, 5, 6; DEBT, 1; ISSUE, 2; FRAUD, 5, 6.

JURISDICTION.

1. The District Courts of the territory, in 1841, had jurisdiction of cases where the amount in controversy was less than fifty dollars. *Koons* v. *Dyer*, 93.
Same point, *Hudson* v. *Matthews*, 94.
2. The fifty dollar limitation of a justice's jurisdiction refers not to the whole of the plaintiff's account, but to the amount claimed to be still due thereon. *Hall* v. *Biever*, 113.
3. In actions before justices of the peace if the sum claimed does not exceed $50, it is within his jurisdiction. *Cochran & Ober* v. *Glover*, 151.
4. The test of jurisdiction is the amount claimed in the plaintiff's declaration. *Bush* v. *Elson & Elson*, 316.
5. A verdict for less than $50 damages in an action of replevin in the District Court, does not determine its jurisdiction of the case. *ib.*
6. Where suit is brought on a bond in which the penalty is beyond the amount of a justice's jurisdiction, the case is cognizable before him, if the amount claimed does not exceed fifty dollars. *Culbertson & Finch* v. *Tomlinson*, 404.
7. In a suit before a justice for $48 the defendant filed a set off for $51.92. Objected to for want of jurisdiction, but it appearing that the defendant claimed less than $50, the set off was allowed. *West* v. *Hatfield*, 493.

See VENUE, 2; APPEARANCE, 5.

JURY.

1. An omisssion of the clerk in certifying a record, upon a change of venue, to state the name of the judge, and that the jury was lawfully sworn, interrogated, &c. at the time the indictment was found, cannot be assigned for error. *Wau-kon-chaw-neek-kaw et al.* v. *United States*, 232.
2. The endorsement on the indictment, "a true bill," with the foreman's name, is merely directory, and if there are no other proofs in the record that the grand jury returned the bill, it is sufficient. *ib.*
3. After the defendant has so far admitted the sufficiency of the indictment as to consent to go to trial, especially after the unanimous ver-

dict of a petit jury, it is too late to question the regularity of the proceedings by which he was put on trial. *ib.*

4. It is not necessary that the grand jurors should be sworn to enquire of offenses committed in an unorganized county attached, &c. *ib.*
5. An opinion formed from rumor is sufficient to exclude a juror; but it must be an opinion as to the guilt or innocence of the prisoner. *ib.*
6. There seems to be no necessity for the intervention of a jury where the plaintiff is entitled to recover a fixed amount, or one which may be ascertained by arithmetical computation.

Chambers v. *Lathrop*, 102.

JUSTICES OF THE PEACE.

1. Strict nicety of pleading is not required in justices' courts. No regular plea is there necessary. *Levi* v. *M'Craney*, 91.
2. Where a defendant obtains judgment against the plaintiff before a justice of the peace upon a set off, the cause will not be reversed because there cannot be found among the justices' papers the bill of particulars or set off. *Niel* v. *Niel*, 491.

See JURISDICTION, 1, 2; ABATEMENT, 4.

LARCENY.

See EVIDENCE, 5.

LEAD MINES.

1. The President of the United States has no power, by virtue of his office, and independent of statutory authority, to lease the lead mines in Iowa. *Lorimier & Waller, administrators,* v. *Lewis*, 253.

LEX MERCATORIA.

See DAYS OF GRACE.

LICENSE.

See GROCERY.

LIEN.

1. The assignee of a note given for the purchase money of land cannot, in equity, enforce the original lien of the vendor against the land. The equity arises to the vendor, but cannot be transferred.

Dickenson v. *Chase et al.* 492.

See EQUITY, 21.

LIMITATIONS.

1. Statutes of limitations may be made to take effect on antecedent contracts. *Maltby & Bolls* v. *Cooper*, 59.
2. By our statute five years are sufficient to bar an action of assumpsit on a promissory note; though in an action of debt six are required. *ib.*
3. The legislature has power to pass a limitation law, to operate on cases where five years have elapsed. *ib.*
4. Statutes of limitation must be pleaded. *Sleeth* v. *Murphy*, 321.
5. Statutes of limitation apply to the remedy, and changes in such statutes take effect upon antecedent contracts. *ib.*
6. A demurrer will lie to a plea of non assumpsit within five years, if the legislature has extended the limitation to six years, which is unexpired at the time the plea is pleaded. *ib.*

LOST NOTES.

1. Under the statute regulating proceedings before a justice of the peace, the owner of a note negotiable by mere delivery may prove the loss of it, and recover the amount of the maker. *White* v. *Mallord*, 494.

MANDAMUS.

1. The writ of mandamus generally issues to a public functionary, to perform some specific duty, and will never be granted where there is any other adequate remedy.
United States ex rel. Davenport et al v. *Commissioners Dubuque*, 31.
2. Where a discretionary duty is imposed on an inferior tribunal, a writ of mandamus will issue to compel that tribunal to act in the premises, but not to direct in what manner it shall act. *ib.*
3. The Court of the highest original jurisdiction is the proper tribunal to issue a mandamus. *ib.*

MARSHAL.

1. The act of Congress of the 17th February, 1799, is the only act regulating the fees of marshals of territories. The act of 1841 relates only to the sum allowed for summoning the jury.
Johnson et al. v. *United States*, 423.

MISNOMER.

1. The omission of the initial of the second Christian name of the assignor in a writ is immaterial. *Hendershott* v. *Thompson*, 186.

See INDICTMENT, 1; ABATEMENT, 6; EQUITY, 23.

MORTGAGE.

1. A mortgage duly executed and recorded is notice to all the world of the interest conveyed. *Warburton et al.* v. *Mattox et al.* 367.
2. If there is a second mortgage on the same property, the second mortgagee must be regarded as knowing at the time he receives his mortgage of the previous mortgage, if the same is recorded. *ib.*

See EQUITY, 9, 12, 13.

NE EXEAT.

See EQUITY, 7, 8.

NEW TRIALS.

1. An erroneous decision in the Court below, on an application for a new trial, may be brought up for review and correction, but for this purpose a strong case must be presented. *Brazelton* v. *Jenkins*, 15.
2. A justice of the peace has no right to set aside the verdict of a jury and grant a new trial. *Helmich* v. *Johnson*, 89.
3. The question of costs, upon granting a new trial, is left to the discretion of the District Court. *Wright* v. *Antrim*, 258.
4. As a general rule, questions in regard to new trials are submitted to the sound discretion of the District Courts, and a case of manifest error must be made out to induce the interference of the Supreme Court. *Fanning* v. *McCraney*, 398.
5. It is not a ground for a new trial, that it was discovered that one of the jurors had expressed an opinion adverse to the plaintiff in error. *Pelton* v. *Jones, Bacon & Co.* 491.
6. In an action on a penal bond of $500 for the conveyance of land, the jury assessed $250 damages, and as the declaration admitted the receipt of $262, this being for more than the balance of the penalty, the verdict was set aside and a new trial ordered. *Bruce & Lingle* v. *Sweatland*, 494.

NIL DEBIT.

See PLEADING, 2.

NOLLE PROSEQUI.

See COMMON COUNTS, 5.

NOTES.

See BILLS OF EXCHANGE, &c.

NOTICE.

1. Upon an agreement to leave premises on receiving ten days notice, ten full days must elapse exclusive of that on which notice is given, before action can be instituted to expel the tenant.

Aiken v. *Appelby*, 8.

See BILLS OF EXCHANGE, &c. 25, 44; MORTGAGE, 1.

NUNC PRO TUNC.

See JUDGMENT, 6.

OATHS.

1. If the form of the oath prescribed by statute to be administered to a petit jury is substantially complied with, it is all that is requisite.

Humphreys v. *Humphreys*, 359.

2. An informal oath administered to a jury, although the informality appearing may be a clerical mistake, cannot be disregarded.

Roberts & Smith v. *Halferty*, 417.

PAROL CONTRACTS.

See FRAUDS AND PERJURIES, 1; EQUITY, 14.

PARTITION.

1. On a petition for partition of land, held in common, it is error to dismiss the petition upon the answer admitting the truth of all the allegations in the bill, but setting forth in avoidance an agreement between the parties by parol to divide the tract in a particular manner, and tendering a deed to and demanding one from the petitioner.

Parker v. *Stewart*, 419.

PARTIES.

See ASSIGNEES, &c. 6; BILLS OF EXCHANGE, &c. 33, 36; EQUITY, 10, 11; FIRM, 3.

PARTNERS.

1. In an action by partners, it is not necessary to prove the names of the individuals composing the firm, if the contract is made in the partnership name. *Gordon & Washburn* v. *Janney & Co.* 182.

2. Where a suit is brought on a note payable to a firm, it is advisable to declare in the partnership name, in order that the proof and allegations may correspond. *ib.*

3. Proof of the defendant's signature to a note given to a partnership is sufficient evidence of the partnership name. *ib.*

Same points, *Bennard* v. *Parvin*, 309.

See EQUITY, 10, 11; FIRM, 3.

PERJURY.

1. On an indictment for perjury, in taking the oath of bankruptcy, it is too indefinite to charge generally that the defendant committed perjury in falsely swearing to his schedule. It should be charged in what particular the perjury consisted.

United States v. *Morgan*, 341.

2. An indictment will not lie at common law, nor under the act of Congress of 1825, against a person for the crime of perjury, for swearing or affirming falsely to the schedule attached to a petition for a certificate of bankruptcy, under the provisions of the bankrupt act of 1841. *United States* v. *Dickey*, 412.

3. The bankrupt law of 1841, as to the penaltics of its violation, is complete within itself. *ib.*

4. The petitioner for a fraudulent concealment of his property, &c. and exhibiting a false schedule, is not liable to be indicted for perjury, unless he subsequently swear falsely in reply to interrogations specially propounded. The consequence of a false statement in the first instance is the loss of a certificate of bankruptcy, and in the second the petitioner incurs the penalties attached to the crime of perjury. *ib.*

PLEADING.

1. Where, after plea, the declaration is amended and then re-filed, the old plea is no longer a plea to the new declaration, without being re-filed, especially after the defendant has been ruled to plead anew.

Porter & Brazelton v. *Moffett*, 58.

2. Where the defendant pleads nil debit to an action on a speciality, the plaintiff cannot treat it as a nullity, but must demur.

Sleeth v. *Cutter*, 56.

3. A general demurrer to the whole declaration must be overruled whenever either of the counts is good. *Chambers* v. *Lathrop*, 102.

4. A failure to enter a similiter to the defendant's plea is not an error for which a reversal can be asked.

Woods & Hobert v. *Morgan & Morgan*, 179.

Same point, *Porter* v. *Lane*, 197.

5. Under the statute allowing the note to be filed in lieu of the declaration, any person holding the note, if payable to bearer, may bring suit in his own name. *Hotchkiss* v. *Thompson*, 156.

6. Where a declaration in slander contains two or more counts charging slanderous words to have been spoken at different times, and the words charged in one count were proved to have been spoken on the very day laid in that count, if the defendant proves a justification for speaking the same, the words contained in a second count, if spoken in August previous to those alleged and proven in the first, will not support the action of slander. *Wright* v. *Britton*, 286.

7. A plaintiff who declares upon a simple contract must come into Court prepared to show, not only that he has a good cause of action *prima facie*, but also to rebut everything which implicates its validity *ab initio*, or which tends to prove its discharge, satisfaction, or release. Therefore a general plea of fraud is good.

Hampton v. *Pearce*, 489.

8. A demurrer to a plea admits the truth of the facts pleaded.

Sleeth v. *Murphy*, 321.

9. Where there is a variance in the declaration as to the amount due, it is only available on special demurrer. *Phillips* v. *Runnels*, 391.

10. Pleas in bar should not look beyond the judgment upon which the action of debt is brought. *Jackson* v. *Fletcher & Butler* 230.

11. A person having a mere right of possession cannot interpose a plea of *title* in an action of trespass against him.

Sage v. *Keesecker*, 338.

12. The plea of title contemplated by the statute is such only as may be legitimately pleaded specially in contradistinction to the general issue. *ib.*

13. A defendant in an action of trespass who wishes to protect his right of possession to the *locus in quo*, by a title less than freehold, must plead the general issue. *ib.*

14. Where a special agreement is made to rescind a former contract, and repay a certain portion of the money advanced, that money cannot be recovered under the common counts, but the declaration must be special. *Lorton* v. *Agnew*, 64

15. The rule in such cases is that the plaintiff cannot recover on the common counts unless there is sufficient evidence to warrant the recovery, independent of the special agreement. *ib.*

PRACTICE.

1. Where a plea is filed before default is actually taken, it is in time, although filed after the time when the plaintiff might have taken a judgment by default. *Davis* v. *Brady*, 101.

2. The Court will refuse to hear proof of any oral agreement between the contending counsellors, to treat the pleadings as amended when they are not, and to show an issue different from that presented by the pleadings on file.

Matthews, assignee of Woods, v. *Tally & Tally*, 159.

3. The defendant, under the general issue and notice of payment, in an action of assumpsit, for goods, &c. is not bound to furnish the plaintiff with a bill of particulars. *Humphreys* v. *Bridgman & Co.* 167.

4. A statute which changes the practice operates upon pending causes, and the proceedings thereafter, should be conducted in accordance therewith. *Davidson* v. *Wheeler*, 238.

5. Assenting to a trial upon the pleas amounts to a waiver of a demurrer on file. *Daugherty* v. *Bridgman & Partridge*, 295.

6. The Supreme Court cannot consider an alleged irregularity in the Court below, in omitting to dispose of a demurrer, unless the record shows that the demurrer was called up for the action of the Court.
Coutch & Kinsman v. *Barton*, 354.

7. After a verdict, it is too late to raise the objection that pleas remain unreplied to, unless the defendant shows that he endeavored to obtain replications prior to the trial. The parties will be presumed to have gone to trial upon issues formed by general replications traversing the special pleas. *ib.*

8. It is not erroneous to instruct the jury "that if they were satisfied that there was an outstanding agreement for the payment of the purchase money for a claim," the plaintiff could not recover under the *indebitatus* count. *ib.*

9. It is not necessary that a jury should have all the papers in a case, the note on which the action is brought is all that is requisite.
Phillips v. *Runnels*, 391.

10. It is a general rule that where the newly discovered evidence is expected to be proved by a witness, who was called and examined, no new trial will be granted, it being the duty of the counsel to ascertain the extent of the witnesses' knowledge when he is on the stand.
Fanning v. *McCraney*, 398.

11. The defendant by pleading over waives his objections to the overruling of the demurrer. *Moore* v. *Ross*, 401.

See DEMAND, 1; NEW TRIAL, 4; JUDGMENT, 4; DISCONTINUANCE, 1; EQUITY, 19, 23.

PRESUMPTION.

1. Where judgment is rendered by default on a note, it will be presumed that the Court required proof of the signature, unless the record shows to the contrary. *Parvin* v. *Hoopes*, 294.

See DATE, 2; INDICTMENT, 3.

PROMISSORY NOTES.

See BILLS OF EXCHANGE, &c.

PROSECUTING ATTORNEY.

1. An action against the county commissioners for services rendered as a district prosecutor cannot be maintained.
Bradford v. *Comissioners of Jackson County*, 219.

PROTEST.

See BILLS OF EXCHANGE, 19.

PUBLIC LANDS.

1. The traffic in public lands is not illegal. *Stannard* v. *M'Carty*, 124.

See CLAIMS, 1; FRAUD, 3.

QUO WARRANTO.

See FERRIES; BANK.

RECEIPT.

1. A receipt for lumber to be sold on commission is not assignable, so as to vest the legal interest in the assignee, and to authorize him to bring suit in his own name. *Bissell & Emmons* v. *Fales*, 491.

RECOGNIZANCE.

See COSTS, 1; BASTARDY, 1.

RECORD.

1. The Court cannot regulate its decisions on extrinsic matters. *Bell* v. *Pierson*, 21.

2. The District Courts have a discretionary power to modify or reverse any order during the term at which it was made. *Chapman* v. *Allen*, 23.

3. Where a record shows itself incomplete, the defect will be regarded the most strongly possible against the plaintiff in error. *Lorton* v. *Agnew*, 64.

4. It is not necessary for the record to show proof of signature of the defendant to the note, where judgment is taken by default at the first term after suit is commenced. This will be presumed unless the contrary appear. *Wilson* v. *King*, 106.

5. The Supreme Court will not infer that a judgment by default in the Court below was on a different day than that which appears in the record. *M'Kell* v. *Neil and wife*, 271.

6. An entry by the clerk, in the Court below, of facts, either proved or admitted, is no legitimate testimony for the guidance of the Supreme Court. *Kerr* v. *Stuart*, 433.

7. A summons, or other writ, is no part of the record, unless made so by a bill of exceptions. *Child & Co.* v. *Risk*, 439.

8. The Supreme Court will not go out of the record. *Burkadink* v. *Baker*, 442.

9. A case must be tried upon the record alone. Affidavits made for the purpose of changing or explaining the record will not be regarded; nor an independent certificate of the clerk, stating facts not apparent in the record. *Musgrave* v. *Brady et al.* 456.

10. A record offered in evidence, which is not anthenticated with the

seal of the Court, may be proven by parol testimony to be a true copy of the record. An exemplification of a record is of no higher authority than a sworn copy. *Porter* v. *Cox*, 494.

REDEMPTION.

1. A mortgager whose mortgage has been foreclosed, has a right of redemption under the act of February 17, 1842, and may remain in possession of the land sold under the mortgage fifteen months, the term allowed to redeem the same. *Jennison* v. *Foltz*, 490.

REMEDY.

1. Where a rule of decision relative to the remedy is changed by statute, the new rule will be applicable to all cases subsequently tried, although they may have been commenced prior to the enactment of the statute. *Ballard* v. *Ridgly & Billon*, 27.
2. Where a statute changes the practice, all subsequent proceedings in cases then pending must be in accordance with such statute. *Ingram* v. *Dooley et al.* 28.
3. A statute which authorizes proof of the failure of consideration on a note arising from a breach of warranty or otherwise, passed after the execution of the note, would operate so as to admit the evidence, as it would only relate to the remedy. But such statute could not operate upon a note previously given, so as to cut off the equities of the maker, inasmuch as that would effect his rights. *Griffey* v. *Payne*, 68.
4. A statute which changes the practice operates upon pending cases, &c. *Davidson* v. *Wheeler*, 238.
5. Statutes of limitations apply to the remedy. *Sleeth* v. *Murphy*, 321.
6. Where a rule of practice is changed by statute, without any saving clause, the new law is applicable to all cases pending. *Meigs* v. *Parker*, 378.

See BILLS OF EXCHANGE, 40; LIMITATIONS, 1, 3, 5, 6.

REMITTITUR.

See JUDGMENT, 4.

REPLEVIN.

See COSTS, 5; JURISDICTION, 4.

RESPONDEAT OUSTER.

1. Where there is a plea to the jurisdiction of a justice sustained, the judgment should not be in chief, but *respondeat ouster*. *Van* v. *Manning*, 491.

RIGHT.

3. The writ of right does not lie to recover the possession of a claim upon the public lands. *Doolittle* v. *Harrington*, 226.

See CONTRACT, 2; JUDGMENT, 3.

RIOT.

1. A riot cannot be justified to remove a trespasser, even if the rioters have a just right to the possession of the land trespassed upon. *Scott et al.* v. *United States*, 142.

2. To constitute a riot, two or more persons should be actually engaged in some physical act of violence. *ib.*

SCHOOL LANDS.

1. The act making it indictable to cut timber off the school land is not contrary to the organic law. *Chalfont* v. *United States*, 214.

2. The legislature has power to punish all injuries to real estate, as misdemeanors, even though the lands belong to the United States. *ib.*

Same point, *Hodgen* v. *United States*, 218.

SEAL.

See BILLS OF EXCHANGE, &c. 12; BOND, 2.

SERVICE OF PROCESS.

1. A service on a defendant on a petition under the mechanics' lien law, by posting a copy of the summons on the property to which the lien attached, is not a good service, unless the defendant cannot be found to receive personal service. And the sheriff should first endorse "Not found." *Colcord & Sprague* v. *Funk*, 178.

2. The mere certificate of a person not a sworn officer is not a sufficient return to a summons; and if it was a service by copy, the return should state that it was left at the defendant's residence. *Romaine* v. *Commissioners Muscatine County*, 357.

3. A special deputy sheriff is a legal and proper officer to serve process, and an attorney for plaintiff may be that deputy. *Wilford* v. *Miller*, 405.

4. The return of the sheriff "Served by reading and delivering an attested copy," does not show on whom it was served, and is defective. *Longacre* v. *Simpson*, 495.

See DATE, 1; APPEARANCE, 2; DEFAULT, 2; SHERIFF, 1, 2.

SET OFF.

See CONSIDERATION, 9; JURISDICTION, 7.

SHERIFF.

1. The sheriff is the proper officer to receive and execute process in all cases, unless there is an affidavit of partiality, prejudice, consanguinity, or interest existing in him or his deputy. *Chord* v. *M'Coy*, 311.
2. If a coroner execute process without such affidavit having been previously filed, the service is void. *ib.*

SIGNATURE.

See BILLS OF EXCHANGE, 4; EVIDENCE, 2; RECORD, 4; JUDGMENT, 1.

SIMILITUR.

See PLEADING; 4.

SIMPLE CONTRACT.

See CONSIDERATION, 1.

SLANDER.

1. To call another "*thieving*" is actionable. *Pierson* v. *Stoertz*, 136.
2. By statute, fornication and adultery are made punishable by fine and imprisonment; consequently, to call a woman a "*whore*" is actionable without proof of special damages.
Cox and wife v. *Bunker and wife*, 269.

See PLEADING, 6; COSTS, 3.

SLAVE.

1. Where a slave goes, with the consent of his master, to become a permanent resident of a free state, he cannot be regarded as a fugitive.
In the matter of Ralph, &c. 1.
2. The act of 1820, for the admission of Missouri into the Union, which prohibits slavery north of 36 degrees, 40 minutes, was not intended merely as a naked declaration, requiring further legislative action to carry it into effect, but must be regarded as an entire and final prohibition. *ib.*
3. The master who, subsequently to this act, permits his slave to become a permanent resident here, cannot afterwards exercise any acts of ownership over him, within this territory. *ib.*

STAMPS.

1. It is not necessary to set out the stamps or devices on bills as part of the description in the declaration, or in the copy appended; and an omission to do so will not prevent the plaintiff from sending the originals to the jury. *Knight* v. *Fox*, 305.

SPECIFIC PERFORMANCE.

See EQUITY, 20, 23.

STATUTES.

1. A statute may take effect prior to its promulgation.
Temple v. *Hays & Hendershott*, 9.
2. A statute may be operative in part, and inoperative in other respects.
Harlan & Duncan v. *Sigler*, 39.
3. It is contrary to the spirit of our institutions to revive without notice a penal statute, grown obsolete by long disuse; especially when the general current of legislation shows the statute to have been regarded by the legislature as no longer in force. Custom can repeal a statute. *Hill* v. *Smith et al.* 70.

See REMEDY, 1, 2, 3; LIMITATIONS, 1, 2; PRACTICE, 4.

SUMMONS.

1. The provisions of the statute rendering it necessary to furnish the defendant with a copy of the summons, was intended for his own benefit, and may be waived by him. *Chapman et al.* v. *Allen*, 23.

See DEFAULT, 2; SERVICE, 1, 2, 3, 4.

TENDER.

See EQUITY, 20.

TIME.

1. The time fixed for performance is deemed the essence of the contract; and if the seller is not ready and able to perform on the day, the purchaser may elect to consider his contract at an end.
Benedict v. *Weston*, 490.
Same point, *Shuffleton & Pitzer* v. *Jenkins*, 427.

TITLE.

See FORCIBLE ENTRY AND DETAINER, 1; EQUITY, 18; PLEADING, 11, 12; HALF-BREED, 3.

TREATY.

See HALF-BREED, 1, 2.

TRESPASS.

1. The action of trespass *quare clausum fregit* being local, must be instituted in the county where the trespass was committed.
Switzer v. *Gowdy*, 248.
2. In an action of trespass, the defendant may properly introduce evidence to prove that the plaintiff had originally taken possession

of the house by disseizin and trespass on the defendant, and that he had a right to the possession of the house at the time of the force and arms complained of by plaintiff; to go in mitigation of damages.
Donald v. *Lightfoot et al.* 450.

3. In an action of trespass for cutting timber on a tract of United States land, occupied as a claim, unless the evidence goes to show that such claim is so marked out that the boundaries can be readily traced, and the extent of the claim easily known, the plaintiff should be non-suited. *Jones* v. *Donahoo*, 493.

See EQUITY, 22; FORCIBLE ENTRY AND DETAINER, 4; PLEADING, 11 12; CLAIM, 5; CONSTABLE, 1.

TRUST.

1. A fund arising from the sale of lands pre-empted for seats of justice, is a trust fund to be specially applied to the purpose contemplated by the grant, and is not subject to the ordinary drafts upon the county treasurers.
Davis & Whicher v. *Commissioners of Muscatine*, 161.

See EQUITY.

VARIANCE.

1. In debt on judgment, where the declaration described the judgment to be for $834.41, *damages and costs*, and the record produced in evidence showed a judgment for $834.41 *damages, besides costs*, held to be a fatal variance. *Hight* v. *White*, 45.
2. Although the variance may be such as would, in this particular instance, operate beneficially to the plaintiff in error, this will not cure the defect. *ib.*
3. Where there is a variance in the declaration as to the amount due, it is only available on special demurrer. *Phillips* v. *Runnels*, 391.

See BILLS OF EXCHANGE, &c. 6, 35, 41; DATE, 1; COPY, 1; INTEREST, 1.

VENUE.

1. It is no grounds of error that the venue in the declaration is laid in the wrong county. *Holmes* v. *Wright*, 100.
2. The venue may be changed, by consent of parties, in all cases where the Court has jurisdiction over the subject matter.
Davidson v. *Wheeler*, 238.
3. The order of the Court changing venue is presumptive of its own regularity, and conclusive, unless something to the contrary be shown by the record. *M'Cauley* v. *United States*, 486.

VERDICT.

1. The District Court may direct such change in the verdict of the jury as to correspond to the usual forms, where such change does not alter the evident meaning of such verdict; and this may be done without the consent of the jury, and, of course, after the separation.
Gordon & Washburn v. *Higley*, 13.

2. The technical phraseology of a verdict is not material, provided the intention is evident. *Harrell* v. *Stringfield*. 18.

3. If the jury fix the imprisonment in petit larceny, it will be regarded as surplusage to the verdict of guilty, and the sentence considered as the act of the Court. *Cropper* v. *United States*, 259.

4. If a verdict does not exceed the principal and interest of the note sued on, it is good, although it may be for more than the damages laid in the declaration. *Phillips* v. *Runnels*, 391.

5. Where, by an agreement of the parties, the jury had leave, after agreeing on their verdict, to seal the same and separate, which was done, and eleven of the jurors returned said sealed verdict, it was held to be a waiver of all exceptions because of such separation.
Woods v. *Com'rs of Van Buren*, 441.

6. As a general verdict of guilty would be defective, so is a general plea of guilty indefinite as to the degree of crime until ascertained by evidence. *M'Cauley* v. *United States*, 486.

See NEW TRIAL, 2; COMMON COUNT, 1; JURISDICTION, 5; COSTS, 4.

VESTED RIGHTS.

1. Although the legislature has not the power to destroy vested rights, it can create or augment them. *Webster* v. *Reid*, 467.

USURY.

See INTEREST, 4.

WAIVER.

See APPEARANCE, 1, 3, 4, 5, 6, 7; NEW TRIAL, 4; VERDICT, 5.

WITNESS.

1. The law will not permit a witness to be interrogated upon a collateral matter merely for the purpose of afterwards contradicting such immaterial statements.
Wau-kon-chaw-neek-kaw v. *United States*, 332.

See BILLS OF EXCHANGE, 17; EVIDENCE, 5; NEW TRIAL, 4; AGENT, 1.

WRIT.

See BILLS OF EXCEPTIONS, 7.

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